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# CHAPTER I

## INTRODUCTION

'Every age, every culture, every custom and tradition has its own character, its own weakness and its own strength, its beauties and cruelties; it accepts certain sufferings as a matter of course, puts up patiently with certain evils. Human life is reduced to real suffering, to hell, only when two ages, two cultures and religions overlap.' H Hesse : German Novelist and Poet. Won the Nobel Prize for Literature in 1946, (1877-1962).

### 1.1 Introduction

The influence of culture and religion in children's rights is evident at both international and municipal law levels. At the international level, the Convention on the Rights of the Child (CRC) attempts to take due account of the importance of traditions and cultural values of each people for the protection and harmonious development of the child.<sup>1</sup> At the municipal level, it is undeniable that conceptions of what is good for children and what is in their interests, their recognised entitlements and rights and the ways of securing them and their duties and obligations towards other family members are to a very large extent dependent upon the traditional and cultural dynamics of any given society.<sup>2</sup> Religious and cultural values therefore provide the individual and communal worldview through which children's rights are defined, realised and through which conceptions such as childhood and processes of childrearing are understood. From this, it becomes evident that to fully explore any aspect of children's rights it is important that one explore the manner in which the universal norms entrenched in the international and municipal law interact with regional and municipal peculiarities and how this interaction influences our understanding of children's rights.

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<sup>1</sup> Convention on the Rights of the Child G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), *entered into force* Sept. 2 1990. (Hereafter CRC).

<sup>2</sup> W Ncube 'The African Cultural Fingerprint? The Changing Concept of Childhood' in W Ncube (ed) *Law, Culture, tradition and Children's Rights in Eastern and Southern Africa* (1998) 11.

## **1.2 The relevance of culture and religion to children's rights**

When adopting the CRC, the United Nations Under-Secretary for Human Rights stated that one of the inherent strengths of the CRC was its capacity to adjust to the different cultural and religious values.<sup>3</sup> Indeed, the CRC and other international and regional human rights instruments do not ignore the sensitive issues such as the child soldier phenomenon, child marriages, child circumcision and other religiously and culturally justified practices. Rather, they confront these difficult controversies in a manner that recognises the ability of deeply held values to either frustrate or facilitate the realisation of fundamental rights. Furthermore, the children's rights movement recognises that while children's rights are universal, they cannot be abstracted from their social, political, religious and cultural contexts. In the early days of the children's rights movement, Eglantyne Jebb noted that, it was important to develop children's rights in harmony with local traditions, needs and opportunities so that what is good is accepted and what is bad rejected.<sup>4</sup> Therefore, to advance children's rights, there is a need for us to critically engage with some of the intricate issues and questions that arise in our attempt to reconcile universal standards with differing socio-cultural and religious values.

## **1.3 Aim of study**

The aim of this paper is to explore the influence of culture and religion on the rights of the child from a South African perspective. This paper does not engage in a debate about whether children's rights are universal or not. The underlying premise is that children's rights are universal. The paper simply uses the universalism and cultural relativism debate as an entry point to a discussion of children's rights in the South Africa. It will explore the extent to which culture and religion influence and impact the interpretation of children's constitutional rights

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<sup>3</sup> J Martenson Statement made at the signing ceremony of 26 January for the United Nations Convention on the Rights of the Child.

<sup>4</sup> E Jebb (founder of Save the Children International Union 1928) cited in D Marshall 'Children's rights in imperial political cultures: Missionary and humanitarian contributions to the conference on the African child of 1931' (2004) 12 *The International Journal of Children's Rights* 273 at 290.

which are modelled on the CRC. The paper will therefore critically and comparatively consider how South African courts have attempted to reconcile universal norms with historical, cultural and religious peculiarities in defining rights and their resultant effect on children and their welfare.

While there have been considerable academic commentaries on the impact and influence of culture and religion on children's rights at the international and regional levels, there has been very little analysis of these dynamics at the municipal level.<sup>5</sup> South African courts grappled with some of the most difficult constitutional questions about children's rights, their recognition and protection in the Constitution and the balancing of these rights with other competing interests. The cases that have come before the courts have risen largely within the context of the family law. From an analysis of the cases and academic commentaries, it is evident that religious and cultural values play significant roles in defining children's entitlements against the state and within the family. While the main focus will be on South Africa, international, regional and foreign jurisprudence will be used in this thesis in keeping with the South African Constitution that encourages the use of comparative sources in the interpretation of the Bill of the Rights.<sup>6</sup>

By advocating a multi-cultural approach to deal with some of the controversial issues that South African courts have in the past confronted or may confront in the future, this paper argues that the universality of children's rights cannot be misconstrued for uniformity. If anything, 'organically' developed strategies that take account of religious and cultural values without blindly succumbing to these values, are the only way a truly universal children's rights discourse can be

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<sup>5</sup> See generally G Douglas and L Sebba (eds) *Children's Rights and Traditional Values* (1998) cited above on the Middle-East, M Freeman (ed) *Children's Rights: A Comparative Perspective* Dartmouth Publishing (Europe), Aldershot (1996). See also P Alston (ed) *The Best interest of the Child: Reconciling Culture and Human Rights* Clarendon Press Oxford (1994) (international), G Van Bueren *The International Law on the Rights of the Child* Martinus Nijhoff, Dordrecht (1995).

<sup>6</sup> Constitution of the Republic of South Africa 1996 previously 'Constitution of the Republic of South Africa, Act 108 of 1996', substituted by s. 1 (1) of Act 5 of 2005).

spoken of in South Africa and the rest of the world.<sup>7</sup> In confronting children's right in the area of family law, as is the case with other areas of law, it is important to excavate social meaning and purpose behind religious and cultural values to bring desired change in the perceptions and attitudes towards children in the private sphere.<sup>8</sup> Religious and cultural values have a tremendous influence on societal perceptions of children and their rights and there is a need for pragmatic responses rather than blinkered approaches to tackle those issues that are the most resistant to outside intervention and change such as those falling within the area of family law. There is no doubt that the value of international human rights law and domestic law depends upon its enforceability, practical application and on its receiving support from the majority of the people.<sup>9</sup> The same is true in South Africa. The effectiveness of constitutional and legislative provisions affording children rights depend on a cooperative relationship between constitutional norms and religious and cultural values or at the very least, the ability of these constitutional norms and values to transform deeply held religious and cultural convictions that undermine the realisation of children's rights.

#### 1.4 Significance of study

South African jurisprudence on children's rights has raised some of the hardest and controversial issues in children's rights discourse.<sup>10</sup> The resultant case law has raised a number of questions about the family and its rights as both a single unit and the rights of its individual members, particularly children. In South

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<sup>7</sup> G Van Bueren 'Children's Rights: Balancing Traditional Values and Cultural Plurality' in G Douglas and L Sebba (eds) *Children's Rights and Traditional Values* (1998) 15 at 17.

<sup>8</sup> M Mutua *Human Rights: A political and Cultural Critique* (2002) at 155.

<sup>9</sup> J Heaton and E Davie 'Children's Rights' (1991) 2 *S Afr Human Rts Y B* 19 at 35.

<sup>10</sup> See *Du Toit v Minister of Welfare and Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) (2002 (10) BCLR 1006), *Hlophe v Mahlalela and Another* 1998 (1) SA 449 (T), *Jooste v Botha* 2000 (2) SA 199 (T), *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T), *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC), *Wittmann v Deutscher Schulverein, Pretoria* 1998 (4) SA 423 (T), *Kotze v Kotze* 2003 (3) SA 628 (T), *G v Superintendent, Groote Schuur Hospital*, 1993 (2) SA 255 (C), *Mthembu v Letsela and Another* 1998 (2) SA 675 (T), *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) and also *Bhe v Magistrate, Khayelitsha* 2004 (2) SA 544 (C), *Bhe and Others v Magistrate, Khayelitsha, and Others*; *Shibi v Sithole and Others*; *South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

Africa and the rest of the world, the family was a holistic social unit grounded in inexorable bonds of association that prized hierarchy over equality and connection over individuality.<sup>11</sup> In addition to this, while the family unit was an autonomous entity, seen as a 'mini state', individual family members, as such, were not. Today, the family has been transformed from being a holistic social unit to an amorphous collection of autonomous individuals understood to relate to each other as family members in so far as they choose to do so.<sup>12</sup> This is not to say that the family has lost its autonomy but merely that as a result of socio-economic changes concepts such as of childhood and family are constantly being reconstructed to accommodate notions of both dependency and individualism.

South African law has had to keep up with these changes and its own socio-political transformations that have ushered in a new dispensation that has implications not only for South Africa as a nation, but also for other African countries that look to the emerging constitutional jurisprudence to confront similar issues. After all, because the South African Constitutional text was shaped by comparative precedent, it has been described as one of the most progressive constitutions in the world. The importance of this study therefore lies not only in a better understanding of children's rights in South African law but also in its universal relevance and applicability.

## **1.5 Justifying the relevance of culture and religion**

Any discussion that focuses on culture and its relevance to children's rights inevitably touches on the question about the universality of rights. The central question in the universalism and cultural relativism debate is the relevance of cultural, religious, political, social and economic values in the interpretation and application of human rights. In his book *International Human Rights and Islamic Law*, Mashood Baderin provides an insightful and useful definition of the term

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<sup>11</sup> J L Dolgin 'The fate of childhood: Legal models of children and the parent-child relationship' (1997-1998) 61 *Alb. L. Rev.* 345 at 352.

<sup>12</sup> *Ibid* at 355.



‘universalism’.<sup>13</sup> This term, he argues, is often used interchangeably to refer to two different aspects of the universalisation of human rights. The two interrelated but distinct concepts are the concepts of ‘*universality of*’ human rights and ‘*universality in*’ human rights. The former refers to the universal quality or global acceptance of the human rights idea while the latter relates to the actual interpretation and application of the human rights idea.<sup>14</sup> For example, the CRC is the most widely ratified international human rights treaty in history with 192 state ratifications, a feat which may be used to show the global acceptance of the idea of children’s rights.<sup>15</sup> In addition to this, alongside other group rights such as women, children and minority groups the Vienna Declaration and Programme of Action reaffirmed the universality, indivisibility, interdependence and interrelatedness of all human rights.<sup>16</sup> This worldwide commitment towards the promotion and protection of the rights of the child is evidence of the *universality of* children’s rights in an era that had earlier perceived the concept of ‘children’s rights’ as a ‘slogan in search of a definition’.<sup>17</sup>

However, the recognition and acceptance of the universality of rights does not deny the relevance of culture or religion in defining the scope and ambit of rights. The preamble of the CRC notes the importance ‘traditions and cultural values’ while the Vienna Declaration mentions the significance of ‘cultural and religious particularities’.<sup>18</sup> In addition to this, the African Charter on the Rights and Welfare of the Child (African Children’s Charter)<sup>19</sup> is said to reflect African conceptions of

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<sup>13</sup> M A Baderin *International Human Rights and Islamic Law* (2003) Oxford University Press.

<sup>14</sup> Ibid at 23.

<sup>15</sup> To date Somalia (signed) and the United States (signed) have not ratified the CRC. Somalia does not yet have an internationally recognized government to ratify the Convention and the United States since 1995 has shown no intention no willingness to ratify it. See <http://www.unhchr.ch/pdf/report.pdf> for status of ratifications of principle international human rights instruments.

<sup>16</sup> Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights 24 June 1993 (part 1) hereafter Vienna Declaration paragraph 5 accessed at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument).

<sup>17</sup> H Rodham ‘Children under the Law’ (1973) 43 *Harvard Educational Review* 487.

<sup>18</sup> CRC and Vienna Declaration cited above.

<sup>19</sup> African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.

children's rights.<sup>20</sup> It may be argued that the influence of culture and religious values is most apparent from an analysis of the number and nature of reservations in the CRC entered by states upon ratification.<sup>21</sup> It is evident that while there may be consensus about the universal applicability of the rights of the child and the abstract principles enshrined in the Convention, considerable disagreement continues to exist when it comes to the more concrete issue of scope and ambit of these rights and principles. To some commentators, the lack of consensus on these issues of substance militates against a proclamation about the universality of children's rights.<sup>22</sup> However, if we adopt Baderin's exposition of the two terms, it is evident that the *universality of* children's rights is settled in international human rights law the *universality in* children's rights remains a considerable challenge which will always exist in society for as long as the human race remains diverse.

Thus, according to Baderin, social, religious and cultural particularities are relevant when interpreting rights (concrete level) and not when considering the universal quality or global acceptance of children's rights (abstract level). Unlike Baderin, other universalists do not draw a distinction between the two notions we have discussed. Some universalists argue that human rights are universal in that the human rights ideal, the scope and ambit of specific rights transcend culture, religion, society and politics.<sup>23</sup> According to Howard, human rights are 'trumps', trumping any other claim that can be made.<sup>24</sup> These commentators are of the

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<sup>20</sup> While the African Charter embraces most of the rights and principles in the Convention on the Rights of the Child, as part of the African human rights system the Charter, like the African Peoples Charter emanates from a unique and peculiar ideological viewpoint. See A Lloyd "evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of experts: *Raising the gauntlet*" (2002) 10 *International Journal of Children's Rights* 179-198. Lloyd notes that the African Charter takes into considerations the virtues of the African cultural heritage, historical background and the values of the African civilisation which inspires and characterises the rights and welfare of the child.

<sup>21</sup> S Harris-Short 'International human rights law: Imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child' (2003) 25 *Hum. Rts*, Q 130 at 135.

<sup>22</sup> *Ibid.*

<sup>23</sup> G Binder 'Cultural Relativism and Cultural Imperialism in Human Rights Law' (1999) 5 *Buff Hum Rts L Rev* 211.

<sup>24</sup> R Howard 'Human rights and the culture wars: Globalization and the universality of human rights' (1997-8) 53 *Int'l J* 94 at 95.

opinion that any reference to 'other' values effectively denies the legitimacy of international human rights law.<sup>25</sup> While these universalists raise some legitimate concerns, their denial of the relevance of culture, religion and social influences in both defining and implementing human rights is problematic.

Cultural relativists, on the other hand, argue that human rights are not inherent in individual human beings independent of society and culture simply because all values are socially constructed and are products of human beings acting in particular historical and social contexts.<sup>26</sup> Its proponents argue that the dominant conception of human rights currently reflected in many international human rights instruments is essentially rooted in the Western rationalist tradition. At the core of the liberal western conception of human rights is the idea of the abstract autonomous individual, rational, independent, self-sufficient, unencumbered and unconnected to others except by choice.<sup>27</sup> To cultural relativist, some non-western societies and some conservative communities recognise a particular communal conception of human rights which is distinct from the individualistic notions propagated by international human rights.<sup>28</sup> Like extreme universalism, cultural relativism deserves its share of criticism. Its tendency to defer to the cultural diversity argument often plays into the hands of the state and is often used to rationalise the arbitrary exercise of power that cannot be justified by claims of philosophic or cultural distinctiveness.<sup>29</sup> At the state level it is used to justify abuse or inaction, while in the private family sphere it is evoked to

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<sup>25</sup> Binder op cit note 23 at 212.

<sup>26</sup> E El-Obaid and K Appiagyei-Atua 'Human Rights in Africa- A New Perspective on Linking the Past to the Present' (1996) 41 *McGill Law Journal* 819 at 831.

<sup>27</sup> K Mickelson 'How Universal is the Universal Declaration?' (1998) 47 *University of New Brunswick Law Journal* 19.

<sup>28</sup> Binder op cit note 23 at 213. See also D Milovanovic 'The Postmodernist Turn: Lacan, Psychoanalytic Semiotics and the Construction of Subjectivity in Law' (1994) 8 *Emory Int L Rev* 67 at 68. 'Modernist thought was a direct product of the Enlightenment. Modernist thought was characterised by the celebration of...the discovery of the individual as an autonomous, self-directing, coherent and unified being (the idea of the *centred subject* expressed best by the idea of *cogito ergo sum* – 'I think therefore I am')'.

<sup>29</sup> A Pollis 'Cultural Relativism Revisited: Through a State Prism' (1996) 18 *Hum. Rts. Q* 316 at 320.

perpetuate oppressive practices that undermine the wellbeing of the child and to fend of state intervention to protect individual rights.

It has been argued that different conceptions of human rights have their place in the development of a truly universal human rights corpus.<sup>30</sup> The affirmation of the universality of children's rights does not imply that these rights should be or can be interpreted and implemented abstracted from their social, economic or cultural context.<sup>31</sup> What is needed in debating children's rights is an internal cultural discourse and an intracultural dialogue as processes through which children's rights may be universalised and a recognition of the absence of a single overriding verity in each philosophical tradition, particularly as it pertains to an individual and that persons rights.<sup>32</sup> The children's rights movement has yielded considerable benefits for many children. This is particularly evident in so far as the state-child relationship is concerned. However, when it comes to the family-child relationship, there is still a long way to go. Many negative attitudes remain unchanged because of rigid approaches that undermined and overlooked deeply held cultural beliefs and practices. As a result, the need for new strategies that respect and promote cultural identities of people without compromising the rights of the child has risen. It has been correctly argued that the value of any legislation adopted will depend upon its enforceability, practical application and on its receiving support from the majority of the people.<sup>33</sup>

## 1.6 Chapter Outline

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<sup>30</sup> See generally A An-Na'im 'Towards a Cross-cultural Approach to defining International Standards of Human Rights: The Meaning of Cruel, Inhuman or degrading treatment or punishment' in A An-Na'im (ed) *Human Rights in Cross Cultural Perspectives: A Quest for Consensus* (1992) and M Mutua op cit note 8 and also I Shivji *The Concept of Human Rights in Africa* (1989).

<sup>31</sup> A Lopatka 'The rights of the child are universal: the Perspective of the UN Convention on the Rights of the Child' in M Freeman and Phillip Veerman (eds) *The Ideologies of Children's Rights* (1992) at 48.

<sup>32</sup> See generally A Pollis and A An-Na'im cited above.

<sup>33</sup> J Heaton and E Davie 'Children's Rights' (1991) 2 *S Afr Human Rts Y B* 19 at 35.

The entire thesis will comprise of four chapters including this introductory chapter. The next chapter will provide an introduction to South African family law, focusing on the recognition and protection of the family and the influence of the best interest principle in defining various aspects of the family law and the impact of the law on children's rights. The third chapter will look at one of the many aspects of the culture, namely customary law and the rights of the child. It will explore the manner in which South African jurisprudence has interacted with culture and the rights of the child. It will be argued that the best interest principle can be used to reconcile the traditional rift that exists between children's rights and religious and cultural values. The fourth and final chapter will then look at the issue of religious beliefs and values and how the courts have interpreted religious freedom, vis-à-vis parental responsibilities towards children. The final chapter will conclude the thesis, providing a summary of the key arguments made.

## CHAPTER II

### WHAT'S CULTURE OR RELIGION GOT TO DO WITH IT? THE FAMILY AND THE BEST INTERESTS OF THE CHILD

'The FAMILY is the most basic unit of government. As the first community to which a person is attached and the first authority under which a person learns to live, the FAMILY establishes society's most basic values.' C Colton 1780-1830, British Sportsman Writer.

#### 2.1 Introduction

One commentator has stated that the family is the 'crucible for the transmission of religious and cultural beliefs'.<sup>34</sup> It is through the family that moral or cultural values are transmitted from one generation to the next. As we noted in the introductory chapter, religious and cultural beliefs have implications for children's rights and, in particular, how their best interests principle is constituted and analysed. In international and domestic law, this basic unit on which human society is founded provides the natural framework for the financial, emotional and material support for the growth and development of its members, particularly children.<sup>35</sup> However, the recognition and protection of the family unit in law has traditionally implied the non-intervention of the state into the private affairs of the family save for exceptional circumstances. Professor Van Bueren has argued that while there is some change, the placing of the child under the exclusive jurisdiction of the family has contributed to the general invisibility of children.<sup>36</sup> It is this complexity that exists between recognition and protection of the family and the protection of the child within this unit that this chapter attempts to explore.

Firstly, it is essential to explore the manner in which international and South African law defines 'the family' and how this definition of impact on the various aspects of children's lives and rights. Secondly, this chapter will consider

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<sup>34</sup> D Brown 'Freedom From or Freedom For? Religion As A Case Study In Defining The Content Of Charter Rights' (2000) 33 *U.B.C. L. Rev.* 551 at 579.

<sup>35</sup> Cited by E Patterson and A Andrews 'Protecting the child against separation from the family environment: Articles 9 and 25 of the UN Convention on the Rights of the Child' (1996) 16 *Child. Legal Rts. J* 2.

<sup>36</sup> Van Bueren *The International Rights of the Child* op cit note 5 at 67.

whether, given the importance of the family unit in society, it is possible to balance the rights of the unit and the rights and duties of individual family members particularly as it pertains to children and their rights.

## **2.2 Defining the family in international law**

It is interesting to note that while international treaty law recognises the family as the basic unit of society and affords it considerable protection, there exists no treaty law definition of the concept of family. The Human Rights Committee (HRC), responsible for monitoring the implementation of the International Covenant on Civil and Political Rights (ICCPR)<sup>37</sup>, has noted that a treaty definition of the concept of family at the international level would be ineffectual given the different conceptions of family that exist throughout the world and even within a single given state.<sup>38</sup> It has also been noted that the family is still a concept in transition.<sup>39</sup> Throughout the world social, economic, political and scientific changes have resulted in an intense re-examination of the scope and meaning of family.<sup>40</sup> The traditional definition of family which revolved around the marital union and blood relationships between husband and wife, parent and child has been expanded to recognise other unconventional familial ties.

As a result, the HRC has noted that state parties are at liberty to recognise diverse conceptions of family such as nuclear, extended, single parent and cohabiting families and that it is up to each state party to report on how the scope of family is defined in their own society and legal system.<sup>41</sup> While international

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<sup>37</sup> International Covenant on Civil and Political Rights (ICCPR), G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force Mar. 23, 1976.

<sup>38</sup> General Comment No. 19: Protection of the family, the right to marriage and equality of the spouses (Art. 23) at paragraph 2 accessed from [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/6f97648603f69bcd12563ed004c3881?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/6f97648603f69bcd12563ed004c3881?OpenDocument) on 10 January 2006.

<sup>39</sup> Van Bueren 'The International Protection of Family Members' Rights as the 21<sup>st</sup> Century Approaches' (1995) 17 *Hum. Rts. Q* 732 at 733.

<sup>40</sup> See J Dolgin *Defining the family: Law, technology and Reproduction in an Uneasy Age* (1997) at 17. She notes that even the advent and development of assisted reproductive technologies and surrogate motherhood complicates finding a definitive definition of the family.

<sup>41</sup> General Comment 19 op cit note 38.

law recognises the cultural sensitivity of the definition of family and therefore afford states considerable discretion, state parties do not have exclusive jurisdiction in defining the family because the definition has to be 'without discrimination'.<sup>42</sup> Despite this, it is evident that different regions and states afford certain family forms more legal recognition and protection than others. Suffice to say, in the face of a wide range of traditional and religious values existing in the international community, international law must be both sufficiently flexible to accommodate a wide range of family structures and values, while simultaneously enshrining universally-agreed upon minimum standards.<sup>43</sup>

In the case of *Hopu and Bessert v France*<sup>44</sup>, the Human Rights Committee, reiterated its view that the concept of family in article 17 of the ICCPR must be given a broad interpretation to include 'all those comprising the family as understood in the society of the State party concerned'.<sup>45</sup> However, it placed some limits on the concept and held that the concept of family did not extend to protect all members of one's ethnic or cultural group nor all one's ancestors, going back to time immemorial.<sup>46</sup>

The importance of religious and cultural values cannot be ignored in any definition or discussion of the family. Evidently, there are different conceptions of family for example between western and non-western countries and these differences have important implications to our understanding of children's rights. Similarly, conservative understandings of family life are often at odds with liberal views of family life. Research has shown that more traditional cultures and religions have a strong belief in the structure of an authoritarian and patriarchal society therefore restricting conceptions of family that either challenge or fail to

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<sup>42</sup> Van Bueren op cit note 39 at 734.

<sup>43</sup> Ibid.

<sup>44</sup> *Francis Hopu and Tepoaitu Bessert v. France*, Communication No. 549/1993, U.N. Doc. CCPR/C/60/D/549/1993/Rev.1. (1997).

<sup>45</sup> Ibid para 4.

<sup>46</sup> Ibid. In this case, the authors of the communication claimed that France had failed to protect an ancestral burial ground constituting arbitrary interference with the authors' family and privacy.



conform to the dominant family structure.<sup>47</sup> The influence of cultural traditions and values is best exemplified through an analysis of African communitarian conceptions of family life which often sit uneasy with 'western' individualistic conceptions of family. Unlike the dominant conception of family in the west, African society is communitarian and revolves around the extended family. Within the extended family, each individual member is assigned specific roles, rights and duties that make that person a part of the social and economic unit. These rights and duties are identifiable through naming. One commentator has noted that the naming of individuals within kinship structures defines and institutionalises the family member's social role.<sup>48</sup> Cobbah further argues that while these roles may appear to be of only morally persuasive value to the western observer, they are 'essentially rights which each kinship member has towards his kin. When it comes to naming and roles, under the African family, conceptions like aunt, uncle and cousin do not necessarily exist. A mother's sister is a younger or older mother, an uncle a father depending on their placing in the family line and a cousin is a sister or a brother. As a result of this child care is very much a communal affair and children are referred to as 'our children' i.e. belong to the lineage or kinship group rather than to two individuals. It is from this conception of family that the commonly cited adage that 'it takes a village to raise a child' emanates. In addition to this, the harmonization of duties and rights within such a community becomes more acceptable than it is in western law.<sup>49</sup> This communal worldview explains the seemingly problematic provisions referring to duties that exist in the African human rights system. This conception of family, rights and duties has important implications for children and their rights that must be taken account of at the international level, despite the fact that they are more apparent at the domestic level. Cobbah argues that if the universality of human rights is to be taken seriously, international law has to recognise that this worldview of solidarity and collective responsibility is for all intents and purposes

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<sup>47</sup> B. J Peens and D. A Louw 'Children's rights: A review of children and adult perceptions' (2000) 19 *Med & L* 275 at 283.

<sup>48</sup> J A Cobbah 'African values and the Human rights Debate: An African Perspective' (1987) 9 *Hum. Rts. Q.* 309-331.

<sup>49</sup> Mutua op cit note 8 at 84.

as valid as European theories of individualism and the social contract and must be taken into account.<sup>50</sup> This issue will be explored in more detail the next chapter on customary law and the rights of the child.

All the major human rights instruments contain provisions that directly and indirectly recognise and protect the family.<sup>51</sup> Professor Van Bueren has noted that there are three overlapping notions relating to the family in international human rights law; firstly, the 'family', which occurs in most instruments such as the ICCPR and the Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>52</sup>; secondly, the concept of 'family life', referred to in the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)<sup>53</sup> and thirdly, the concept of 'family environment' which is found in the CRC and the African Children's Charter.<sup>54</sup> The CRC and the African Children's Charter refer to both the 'family environment' and 'family' in the same instrument. All three notions seem to cover common ground and, from an analysis of the jurisprudence seem to protect the similar interests.

However, whatever term is used to recognise and protect the family in international law, it is evident that the definition of family has profound implications for children and their rights. One commentator has noted that from

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<sup>50</sup> Cobbah op cit note 48 at 323.

<sup>51</sup> Universal Declaration on Human Rights (1948) articles 12, 16, 18, 25 and 26; International Covenant on Economic, Social and Cultural Rights (1966) articles 10, 13.3 ; International Covenant on Civil and Political Rights (1966) art 23 & 17; American Convention on Human Rights; European Convention for the Protection of Human Rights and Fundamental Freedoms articles 8 and 12, ; African Charter on Human and Peoples' Rights (1986) articles 18, 27 & 29; Convention on the Elimination of All Forms of Discrimination against Women, Convention on the Rights of the Child, African Charter on the Rights and Welfare of the Child, Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962) .

<sup>52</sup> International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976.

<sup>53</sup> Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 222, *entered into force* Sept. 3, 1953, *as amended by* Protocols Nos 3, 5, 8, and 11 *which entered into force* on 21 September 1970, 20 December 1971, 1 January 1990, and 1 November 1998 *respectively*.

<sup>54</sup> CRC and the ACRWC use both terms family and family environment. See preamble of both and article 20 of CRC.

an analysis of international and regional law protection of family, family life or the family environment encompasses a wide range of protections that all depend on an examination of the various needs and functions of the family.<sup>55</sup> Protection and recognition of family therefore encompass the following: the right to marry; the right to be a parent; equality between the sexes within the family context; protection for children within the family context and the family's right to privacy. From this, it is evident that recognition of the family entails not only protection of the family as a single entity but also protection of individual members within the unit. As we have already noted international and regional jurisprudence has attempted to formulate an all embracing and flexible approach towards what constitutes a 'family' and determining who is a 'family member'. However, as is often the case, the rift between international standards and municipal law is always clearer when one considers local case law.

### 2.3 The family in South African law

South African law contains no specific definition of the family. However, in the case of *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others*<sup>56</sup>, the court stated that:

'[F]amilies come in many shapes and sizes. The definition of the family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms.'<sup>57</sup>

Relying on this dictum Professors Cronjé and Heaton have defined the concept of family as including all people who are blood relations or have become related through adoption or marriage, or marriage-like relationships.<sup>58</sup> One may argue that such a definition is in line with South Africa's international obligations towards the family which require that the definition of family be without

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<sup>55</sup> Y Merin 'The right to family life and civil marriage under international law and its implementation in the State of Israel' (2005) 28 *B.C. Int'l & Comp. L. Rev* 79 at 87.

<sup>56</sup> *Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) (2000 (8) BCLR 837).

<sup>57</sup> *Ibid* at para [31] at 960C by O'Regan J.

<sup>58</sup> DSP Cronjé and J Heaton *South African Family Law 2<sup>nd</sup> ed* (2004) at 3.

discrimination. However, the meaningfulness of such a broad definition is tested in the court's treatment of family.

It must be noted that prior to this judgment, the Constitutional Court in the *Certification* judgment had noted that while the South African Constitution contained no express provision protecting the family, it was highlighted that the constitutional text contained numerous provisions that indirectly protected the institutions of family and marriage.<sup>59</sup> One of these provisions was the section 28 which states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.<sup>60</sup> While this provision has both directly and indirectly been referred to by the Constitutional Court, it is clear that it has been instrumental in transforming South African constitutional jurisprudence on the family and children's rights.<sup>61</sup>

In *Patel and Another v Minister of Home Affairs*, the Durban High Court was confronted with a foreign national who had been arrested by the Department of Home Affairs who sought to deport him despite the fact that he was married to a South African citizen with whom he had children.<sup>62</sup> The Court rejected the respondents arguments that the applicant was not protected by the Constitution noting that the Department had failed to take account of the rights of the applicants to live together as per the *Dawood* case and the right of the applicants children to family or parental care.<sup>63</sup>

In one of the first cases before the Constitutional Court to touch on the rights of children, the Court in *Government of the Republic of South Africa v Grootboom*<sup>64</sup>, noted that the section 28 rights as a whole imposed obligations on both the state

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<sup>59</sup> Ibid at paragraphs [96]-[103] at 806H/I, 808A, 808D and 808G.

<sup>60</sup> Constitution of South Africa op cit note 6 at s28 (1) (b).

<sup>61</sup> *Du Toit v Minister of Welfare and Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) and others cited in note 10.

<sup>62</sup> *Patel and Another v Minister of Home Affairs* 2000 (2) SA 343 (D).

<sup>63</sup> Ibid at 350F-G.

<sup>64</sup> *Govt of the RSA v Grootboom* 2001 (1) SA 46 (CC) (2000 (11) BCLR 1169).

and families to provide for children.<sup>65</sup> Speaking in the context of right to shelter, the Court stated that while the primary obligation to provide shelter lay with the family and only alternatively with the state, state obligations towards children would be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse.<sup>66</sup> In a later case the Constitutional Court reiterated this point and added that there was an obligation on the State to create the necessary environment for parents care for their children.<sup>67</sup>

However, contrary to the reasoning of the Constitutional Court and *Patal*, the Transvaal Division in the case of *Jooste v Botha*<sup>68</sup> held that while the section 28 was aimed at the preservation of a healthy parent-child relationship against unwarranted executive and administrative action, it could not be used as a cause of action for a claim for damages based on a failure to provide a child with love, interest, recognition and attention.<sup>69</sup> In this case an 11year old boy born out of wedlock laid a delictual claim for iniuria against his father to acknowledge him and love him. The claim was based on his the section 28 right to parental care and the best interests clause. In denying the claim, the court reasoned that the right to parental care referred to the custodian parent. The judgment of the court was clearly in consistent with both *Grootboom* and *Patel* which enforced the rights of children to live with members of their families and other cases which recognised the rights and responsibilities of non-custodian parents.<sup>70</sup> What is also interesting is that since the advent of the Constitution South African courts have used the children's right to enforce the rights of fathers of children born out of wedlock but in this case was unwilling to enforce the child's rights on the basis

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<sup>65</sup> Ibid at paras [76]-[79]

<sup>66</sup> Ibid at para [78].

<sup>67</sup> *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC) (2003 (2) BCLR 111) para [24].

<sup>68</sup> *Jooste v Botha* 2000 (2) SA 199 (T).

<sup>69</sup> Ibid at 201E - F, 202D/E - E/F, 206G, 207B – C, 207H, 208F/G - G/H and 209G.

<sup>70</sup> G J Van Zyl and J C Bekker 'Unmarried fathers should not have their cake and eat it: Case comment on *Jooste v Botha* '(2000) 33 *De Jure* 149.

that the law cannot create love and affection where there are non.<sup>71</sup> Commentators have rightly argued that the reasoning of the court creates the impression that children have the right to parental involvement only in so far as their parents choose to be involved and to the extent that their rights do not interfere with their parents' convenience.<sup>72</sup> Furthermore, it must be argued that the reasoning of the court was contrary to the principle in the CRC which holds that both parents have common responsibilities for the upbringing and development of the child.<sup>73</sup> Positively, it must be noted that *Jooste* stands alone in the line of South African cases interpreting the family rights of children.

In *Du Toit and Another v Minister for Welfare and Population Development*, the Constitutional Court following from its reasoning in *Dawood* noted that legal conception of the family and what constituted the family change as social practices and traditions change.<sup>74</sup> This case involved a challenge to pre-constitutional provisions of the Child Care Act<sup>75</sup> that modelled the parent-child relationship on the heterosexual norm and implicitly discriminated against same-sex couples who sought to adopt a child jointly. In addition to holding that section 17(a) and (c) of the Child Care Act unconstitutional for discriminating against same-sex couples, the Court also reasoned that the provisions effectively overlooked the best interests of the child and the child's right to family or parental care.<sup>76</sup> The court thus recognised that family life is important for child rearing and that adoption is a meaningful way of affording children the advantages of family life.<sup>77</sup> While it may have not been obvious at the time, the approach of the court was consistent with the Convention on the Rights of the Child and other

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<sup>71</sup> *Jooste* supra note 68 at 209H-I. It must be noted that the common law has never directly enforced the rights of children against their parents but have more recently and increasingly used the best interest principle to enforce such rights.

<sup>72</sup> E Bonthuys and T Mosikatsana 'Law of Persons and Family Law' *Annual Survey of South African Law* (2000) at 152.

<sup>73</sup> CRC op cit note 1 at article 18 (1).

<sup>74</sup> *Du Toit* supra note 61.

<sup>75</sup> Child Care Act 74 of 1983 Sections 17(a), 17(c) and 20(1).

<sup>76</sup> *Du Toit & Another* supra note 61 at para [18].

<sup>77</sup> *Ibid.*

children's rights jurisprudence which had began to define the family in terms of children's needs rather than from a perspective of the adult alone.<sup>78</sup>

From this, it may be argued that recognition of a child's right to family or parental care goes beyond the protection against unwarranted executive, administrative and legislative acts that prevent the development of a healthy parent-child relationship. State obligations towards children under section 28 also require positive state action to facilitate such a relationship to enable families who are unable to fulfil their obligations by providing them with social assistance and other support. At the same time, state obligations under this provision also require the state to intervene into the private domain of the home where the welfare and rights of the child are threatened.

## **2.4 The extended family in South African law**

As we have already shown South African family law appears to be considerably accommodative when it comes to defining the child's right to parental care, however, when it comes to family care the courts appear to grapple with recognising certain forms of family relationships. While the courts have noted that families come in different shapes and sizes, because of the influence of the common law in South African family law, there continues to be dominance of nuclear family and often at the expense of extended family which exists in many sections of the society.

In the case of *Bethell v Bland*, the maternal grandfather of a child born out of wedlock brought an application for the custody of the child.<sup>79</sup> The paternal grandparents brought a counter-application, and the natural father intervened. Awarding custody to the natural father, the court referred to both sets of grandparents as third parties who did not have an inherent right to custody. The same reasoning was applied in the case of *Townsend-turner and Another v*

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<sup>78</sup> See generally, B B Woodhouse 'Out of Children's need's, children's rights: The Child's voice in defining the family' (1993-94) 8 *BYU. J. Pub. L.* 321-341.

<sup>79</sup> *Bethell v Bland* 1996 (4) SA 472 (W).

*Morrow*.<sup>80</sup> Unlike the facts in *Bland*, the grandparents involved in this case approached the High Court for an order granting them the right to access of their grandchild. In a similar type reasoning however the Cape High Court held that while grandparents were increasingly playing a role in modern society, under common law, apart from the blood relation between grandparents and their grandchildren their position in law was similar to that of the father of a child born out of wedlock and had no inherent right to access.<sup>81</sup> Similar reasoning was applied in *Hlophe v Mahlalela*<sup>82</sup>, in which maternal grandparents sought custody of their grandchild under customary law against the father of the child. The father claimed custody of the child in terms of the common law. To avoid applying customary law, the court held that because the mother and father of the child had subsequent to a customary union, concluded civil marriage, the parent-child relationship before the Transvaal High Court was to be decided under common law.<sup>83</sup> The Court rejected the claim by the grandparents because *lobolo* had not been paid in full they were entitled to retain custody of their granddaughter. The court stated it would not enforce an 'arrangement that smacked of sale of or the trafficking in children'.<sup>84</sup> The case and the reasoning of the Court in this and the other cases raise some fundamental distinctions between the varying conceptions of family life that exist between what is often termed western individualistic values and communitarian values which now exist simultaneously in South Africa's diverse population.

It has been argued that when it comes to custody and other child related issues, western-based law conceptualises custody, access or other family law notions in terms of an *individual's* right over his/her child. Customary law, on the other hand, conceptualises custody in terms of *familial* and transgenerational rights.<sup>85</sup>

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<sup>80</sup> *Townsend-turner and Another v Morrow* 2004 (2) SA 32 (C).

<sup>81</sup> *Ibid* at 44.

<sup>82</sup> *Hlophe v Mahlalela* 1998 (1) SA 449 (T).

<sup>83</sup> *Ibid* at 458E/F--459C.

<sup>84</sup> *Ibid* at 458E/F--459C.

<sup>85</sup> A Armstrong 'School and Sadza: Custody and the best interests of the child in Zimbabwe' in P Alston (ed) *The Best Interests of the Child: Reconciling culture and Human Rights* op cit note 5 at 158.



This is not to say that customary law does not recognise the primacy of the parent-child relationship, but merely that certain kinds of 'rights' exist based on the caring that a relative has done of the child in the past which may seem merely 'moral' from a western viewpoint but quite authoritative in customary law. Interestingly, such recognition is not only a preserve of customary law but is also recognised in American jurisprudence for example. In *Moore v. City of East Cleveland*<sup>86</sup>, the US Supreme Court recognised that the extended family was often responsible for instilling moral beliefs in children and taught them citizenship and as such, child rearing rights were extended to whoever was responsible for preparing the child for additional obligations of being a citizen.<sup>87</sup>

Therefore, it is argued that recognition of the extended family and the role it plays in South African society is long overdue. This is especially so, with the increase in dependence upon the extended family occurring in the context of increasing poverty and the high HIV/AIDS prevalence which has left millions of children without their biological parents. Such recognition would also be in keeping with the Constitutional Courts which took account of the social reality that not all children are raised by their biological parents and that many are brought up in an extended family context.<sup>88</sup> In addition to the supportive influence of the extended family, recognition of other forms of family life is imperative in constitutional democracy that affords legal protections to family members without discrimination.

It must be noted that in addition to the definition of family life, the protection that is afforded to the family as a unit and with regard to individual family members has a considerable bearing on the rights of the child. As we have noted in the previous section, the protection and recognition of the family entails not only its protection as a unit against unwarranted state intervention and respect for its privacy but also the regulation if not monitoring the rights of the child within this

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<sup>86</sup> *Moore v. City of East Cleveland* 431 U.S 494, 503-05 (1977).

<sup>87</sup> *Ibid* at 504-6.

<sup>88</sup> *Du Toit & Another* supra note 61 at para [18].

private unit. No doubt, balancing the rights of the family as a unit and recognition of the individuality of the child with recognised rights is a difficult task for many courts. In the past and in some societies today, the family was traditionally accorded considerable protection from the state that some commentator have argued that because of this protection the family unit has a strong capacity to construct a buffer around itself resisting state interventions that are intended to open it up for the protection of its weakest members, namely women and children.<sup>89</sup> Increasingly however, international and municipal law has realised that protection of the family unit is futile if individual members live in an oppressive, coercive or abusive environment.<sup>90</sup> State intervention in the private realm of the family or home is particularly crucial when it comes to the rights of children who rely on this unit to meet the most basic needs. However, in a multi-cultural society such as South Africa, the differences that exist between various cultural and religious traditions that guide societal and parental attitudes in the area of parent-child relationships and childrearing methods raise constitutional questions that not only directly touch on the rights of children but lay at the core of certain constitutional guarantees as they relate to the parents or families. The following two chapters will therefore attempt to explore the complexities that arise from recognition of the rights of the child and the rights of parents and families in the context of religious and cultural rights.

## **2.5 Conclusion**

Like every other society, the family is the basic unit of South African society. The South African Constitutional Court has recognized that families come in many shapes and sizes and that the definition of family though useful, changes as social practices and traditions change.<sup>91</sup> Recognition of this fact has had a tremendous impact on the rights of children and their families. Today, whatever conception of family is used in South African case law, it cannot be denied that

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<sup>89</sup> Ncube (ed) *Law, Culture, tradition and Children's Rights in Eastern and Southern Africa* op cit note 2 at 13

<sup>90</sup> Merin op cit note 55.

<sup>91</sup> *Dawood and Another v Minister of Home Affairs* supra note 56.

the rhetoric of children's rights and the constitutional right of children to parental care and family care have been instrumental in reconstructing our views of family. It is because of children's rights that the traditional conception of family that revolved around the marital union and its consequences has been expanded, taking account of the constitutional values and principles and most importantly from the perspective of the best interests of the child. Today, the South African family embraces both the traditional and the modern conceptions of family including single parent and same-sex unions and protecting all forms of the parent-child relationships. The approach of the courts has moved the focus from the strict adult oriented rights to one that focuses on the needs and rights of the child. However, while these developments can only be welcomed, it is clear that there are still a few areas that require attention. The focus on the nuclear family remains entrenched in a society in which the extended family is alive and well across racial lines. There is an urgent need for the law to recognise the role that extended family members play in the lives of children if not to respect the cultural traditions of a large number of the population, then to keep up with the social reality of the post-constitutional South African community.

It is clear from that South African children's rights discourse has not only influenced the recognition and protection of family life but it has also fundamentally altered the internal workings of the family unit. The constitutional rights of children have not only implied a recognition of the right of children to family and parental care in the sense of the right of children to belong to a family and live with that family, but has also transformed the traditional family/parent-child relationship. The next chapter will explore the issue of children's rights and culture within the context of African customary law. It will go into detail with threads that have been touched on in this chapter on the African conception of family, children and their rights. While the main focus will be on customary law it is essential to bear in mind the differing conceptions of family and the best interests of the child which exist between customary law and common law.



## CHAPTER III

### RECONCILING THE IMPOSSIBLE: THE RIGHT TO CULTURE AND THE BEST INTEREST OF THE CHILD

'Once the application of customary law is considered a constitutional right and not a precarious freedom it is thrown into competition with the other fundamental rights. The result will be a series of conflicts, especially between the right to equal treatment and the many rules of customary law that subordinate the interest of women and children to senior males.'  
Professor T Bennett (1994)

#### 3.1 Introduction

The inclusion of the right to culture alongside the equality clause in the Bill of Rights has serious implications for the rights of women and children who are often disadvantaged by the application of customary law, especially in the areas of personal and family law. As a result of this, the South African Constitution recognises the right of persons to participate in the cultural life of their choice and to enjoy their culture in so far as such exercise is not inconsistent with any provision of the Bills of Rights.<sup>92</sup> International children's rights law prohibits customary, traditional, cultural or religious practices that conflict with the rights of the child.<sup>93</sup> Despite these attempts to fortify the rights of the child in international and domestic law, courts continue to grapple with how to balance competing interests when the right to culture is pitted against some other fundamental right such as the right to equality. In the international sphere a number of countries like Djibouti and the majority of Islamic states entered declarations to the CRC that stipulate that it shall not be bound by provisions or articles that are incompatible with its religion and its traditional values.<sup>94</sup> Similarly in the domestic sphere, the cultural, traditional and religious practices and beliefs are often justified by reference to the right to culture, which is recognised in almost all the major human and children's rights instruments and national constitutions. This

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<sup>92</sup> Constitution of the South Africa op cit note 6 at s30 and 31.

<sup>93</sup> African Children's Charter op cit note 19 at article 1 and CRC op cit note 1 at article 5.

<sup>94</sup> The Djibouti declaration, other countries that have attached similar reservations are Iran, Oman, Qatar, Saudi Arabia, the Syrian Arab Republic, Brunei, Iran and Mauritania accessible at UN Declarations and Reservations [http://www.unhchr.ch/html/menu3/b/treaty15\\_asp.htm](http://www.unhchr.ch/html/menu3/b/treaty15_asp.htm) accessed on 10 January 2006.

chapter attempts to explore how South African law has dealt with this difficult conflict and its impact on children and their rights.

### **3.2 The right to culture and other rights**

Since the early constitutional negotiations the inclusion of the right to culture in the Bill of Rights has been controversial especially in so far as the right related to other rights. On the one hand of are those commentators who argued and continue to argue that in the event of a conflict between the right to culture and the right to equality or dignity, the latter must always prevail.<sup>95</sup> These and other critics found their argument in a purposive reading of the constitutional preamble and the table of non-derogable rights. On the other hand commentator like Professor Bennett and others argue that no right trumps the other and as a fundamental constitutional right, the right to culture must be balanced against the other rights as they all have equal weighting.<sup>96</sup> It must be argued that the first view of the right to culture stems from particular conception of rights as being either first or second generation and drawing a distinction between civil-political and socio-economic and cultural rights. Such reasoning has no doubt been overtaken by the recognition that all rights are interdependent, interrelated and indivisible.<sup>97</sup> Furthermore, it portrays culture as a constant barrier to the realisation of fundamental rights when in some cases common ground can be found which facilitates rather than frustrates the realisation of rights. Justice Sachs supports the view proposed by Professor Bennett and states that:

It is important to avoid an unfortunate but prevalent tendency to put customary law and the constitutional principle of equality on a collision course, i.e. to say that for the one to live, the other must die, or to use a less dramatic metaphor, if customs triumphs, equality must fail [or vice versa]. I think this is a profoundly mistaken view. Our Bill of Rights is not based on a hierarchy of rights, nor is it an assemblage of categorically defined rights sealed off from

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<sup>95</sup> F Kaganas & C Murray 'the Contest between culture and gender equality under South Africa's interim Constitution' (1994) 21 *Journal of Law and Society* 409-33.

<sup>96</sup> T W Bennett *Human Rights and African Customary Law under the South African Constitution* (1994) at 28.

<sup>97</sup> Vienna Declaration op cit note 16.

each other. Rather it contemplates the interdependence of *mutually supportive rights*.<sup>98</sup> In an attempt not to put cultural values and the right to culture on a collision course, this chapter argues that it is possible and in fact advisable to respect the right to culture without compromising the rights of the child. Moreover, the universal principle of the best interests of the child can be creatively used to facilitate such reconciliation between culture and children's rights. However, to get there it is important that we have a good understanding of the right to culture and its importance in the South African constitutional framework. Thereafter, through an examination of the customary law especially that dealing with succession, this chapter will show that culture not only influences societal perceptions of children portraying them in a particular light be it positive or negative but also influences societal conceptions of what constitutes the best interests of the child and the entitlements of children under law.

### 3.3 Defining the right to culture

It must be admitted that the concept of culture is difficult to define. It has been used in a number of disciplines to refer to a wide range of ideas, processes and paradoxes.<sup>99</sup> For example, in anthropology culture refers to the expression of an ethnic group's speech, thought processes, actions and aspirations.<sup>100</sup> In common English, culture implies high intellectual or artistic endeavour.<sup>101</sup> However, in human rights law, according to Professors Bennett, culture denotes a people's entire store of knowledge and artefacts, especially the languages, systems of belief, and laws that give social groups their unique characters.<sup>102</sup> This definition

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<sup>98</sup> A Sachs 'Towards the Liberation and Revitalization of Customary Law' Pre-Dinner address at Southern African Society of Legal historians Conference on 'Law in Africa: New Perspectives on origins, foundations and transition'. Held at Roodevallei Country Lodge, Pretoria on 13-15 January 1999 at page 15.

<sup>99</sup> L Juma 'Reconciling African customary law and human rights in Kenya: Making a case for institutional reformation and revitalisation of customary adjudication processes' (2001-2) 14 *St. Thom. L. Rev* 449 at 472.

<sup>100</sup> DP Stoffberg cited by E Boonzaier and J Sharo (eds) *South African keywords: The uses and abuses of political concepts* (1988) at 17.

<sup>101</sup> T W Bennett *Human Rights and African Customary Law* (1995) at 23.

<sup>102</sup> Bennett *ibid* at 24.

of culture is in accordance with our understanding of the right to culture in international and domestic law.

It has been said that the right to culture encompasses a wide range of protections that arose from the incorporation of the principle of non-discrimination into *jus cogens* in the aftermath of World War II.<sup>103</sup> This principle requires state recognition that all persons are equal before the law and entitled to equal protection of the law prohibiting all forms of discrimination. Originally, the right to culture protected rights of ethnic and religious minorities who faced persecution and discrimination in Europe in the early 19<sup>th</sup> century. The Universal Declaration of Human Rights (UDHR) which was adopted in 1948 included a provision which simply stated that 'everyone has the right to freely participate in the cultural life of the community'.<sup>104</sup> In the 1960s, the right to culture was relied upon by the oppressed majority in colonies all over the world to demand self determination and by various cultural communities as well. Both the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>105</sup> and the ICCPR<sup>106</sup> adopted in 1966 included a provisions protecting the rights of persons to take part in their cultural life and the rights of ethnic and religious or linguistic minorities to enjoy their own culture and practice their own language.<sup>107</sup> From these provisions it is evident that the right to culture can be approached in two ways. Firstly, the right can be evoked by both individuals and by communities. Secondly, it imposes both negative and positive duties on the state. At the municipal level the right to culture is therefore wide in scope and application.

As is the case in international law, the South African law generally protects the right to culture in the same way. In the *Christian Education* case the Constitutional Court noted the following:

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<sup>103</sup> L Berat 'Customary Law in the New South Africa: A Proposal' (1991-92) 15 *Fordham Int'l L J* 92 at 95

<sup>104</sup> Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948) at article 27.

<sup>105</sup> ICESCR op cit note 52.

<sup>106</sup> ICCPR op cit note 37.

<sup>107</sup> ICCPR article 27 and ICESCR at article 15.



The rights protected by s 31 are significant both for individuals and for the communities they constitute. If the community as community dies, whether through destruction or assimilation, there would be nothing left in respect of which the individual could exercise associational rights. Moreover, if society is to be open and democratic in the fullest sense it needs to be tolerant and accepting of cultural pluralism. At the same time . . . the protection of diversity is not effected through giving legal personality to groups as such. It is achieved indirectly through the double mechanism of positively enabling individuals to join with other individuals of their community, and negatively enjoining the State not to deny them the rights collectively to profess and practise their religion (as well as enjoy their culture and use their language). . . <sup>108</sup>

It is from these wide protection of the right to culture that it has been recognised both in international and domestic law that the right encompasses the right of religious and cultural groups to foster their cultural identity by maintaining separate schools, speaking a distinctive language, practicing a certain religion and applying a personal legal system identified with the group.<sup>109</sup> However, while the right to culture enjoys recognition and protection under the South African law it must be noted that these rights are subject to both internal and general limitation. In South Africa two of the most controversial aspects of the right to culture have been the application of indigenous/customary law and the influence of religion in so far as they relate to the rights of women and child. This chapter however, will only focus on the application of customary law and the rights of the child.

### **3.4 Customary law and the right to culture in South Africa**

A proper understanding of customary law in the South African context has a substantial bearing on our attempt to reconcile the right to culture and children's rights. For centuries, the term customary law has always evoked the idea of primitive, traditional or immutable norms that from an outsider and positivist's point of view do not even qualify to be called 'law'.<sup>110</sup> What then is customary law?

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<sup>108</sup> *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) (2000 (10) BCLR 1051) at 772D - 774D (SA) and 1062D - 1064D (BCLR), Sachs J.

<sup>109</sup> T W Bennett 'The Compatibility of African Customary Law and Human Rights' (1991) *Acta Juridica* 18 at 22.

<sup>110</sup> M Ahrén 'Indigenous peoples' culture, customs, and traditions and customary law-The Saami people's perspective' (2004) 21 *Ariz. J. Int'l & Comp. L.* 63 at 63.

Hamnett defines customary law as 'a set of norms which actors in a social situation abstract from practice and which they invest with binding authority'.<sup>111</sup> He argues that, unlike positive law, customary law is not ascertained by asking what judges and lawyers say is law, but rather 'what do the participants in the law regard as the rights and duties that apply to them?'.<sup>112</sup> Thus, customary law does not gain its authority from formal acts such as a vote from an assembly but derives its existence and content from social acceptance.<sup>113</sup> Intrinsically connected to the culture of the people whose conduct it is supposed to govern, it is subject to constant change and modification.<sup>114</sup> For example, in pre-colonial customary law, the system of *lobolo* (bride wealth) required the family of the groom to deliver a certain number of cattle to the family of the bride. The delivery of cattle symbolised the conclusion of a valid marriage. However, when the colonial economy took over, young men abandoned agricultural production and migrated to urban areas in search of work. In response to this, the use of cash in place of cattle for *lobolo* became an accepted norm.<sup>115</sup> Contrary to the belief of positivists, customary law was not antiquated and static. However, in South Africa as well as many other African countries that experienced colonisation, colonisation resulted in the codification of customary law.

Unaccustomed to such an unwritten and therefore unascertainable system of law, colonial administrators treated customary law in an array of ways. In some places customary law was totally disregarded and unrecognised under the belief that such law was uncivilised. With time, however, customary law was recognised and applied but always from a strongly paternalistic and superior point of view subjecting it to systems and processes unfamiliar to customary law. It was subjected to repugnancy clauses and the formally unwritten law became

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<sup>111</sup> I Hamnett *Chieftainship and Legitimacy: an anthropological study of executive law in Lesotho* (1975) at 14.

<sup>112</sup> Ibid at 10.

<sup>113</sup> Ahrens op cit note 110 at 106.

<sup>114</sup> Ibid.

<sup>115</sup> D Koyana *Customary Law in a Changing Society* (1980) at 6-8.

codified in precedent and legislation to make it fit into the dominant positivist legal system.<sup>116</sup> Thus, while customary law was recognised by the courts, it was not on the same footing, but subservient, to the common law.<sup>117</sup> Customary law was treated as an inferior system of law and soon became an 'invented tradition' as it was interpreted and applied by the courts.<sup>118</sup>

Justice Mokgoro has stated that, today, customary law embodies legislative enactments and judicial pronouncements on African social traditions and customs.<sup>119</sup> It has arguably lost its characteristic flexibility that made it responsive to the ever-changing needs of the communities it serves. This is not to say that with the formalisation of customary law, its actors or participants ceased regulating their lives in accordance with culturally binding norms. Rather, customary law continues to operate today alongside the legislated and judicial customary law. It is from this mix that we get the terms 'living' and 'official' customary law. Today, the disjunction between official and living customary law remains one of the most contentious issues in South African jurisprudence.

For many Africans, the application and recognition of customary in the South African Constitution allows them to participate and express their ethnic identity while at the same time its application is tied to the assertions of Jan Smuts. As Prime Minister of the South African Union, Smuts stated that his opposition to equality with Blacks was not rooted in a belief of their inferiority, but rather in the concern that racial integration would destroy African culture.<sup>120</sup> Professor Bennett has rightly noted that:

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<sup>116</sup> Bennett op cit note 109 at 18.

<sup>117</sup> See for example *Ismail v Ismail* 1983 1 SA 1006 (A) at 1024F in which the court had stated that 'the concept of marriage as a monogamous union firmly entrenched in our society and the recognition of polygamy, would, undoubtedly, tend to prejudice or undermined the status of marriage as we know it.

<sup>118</sup> Bennett op cit note 89 at 157.

<sup>119</sup> Y Mokgoro 'The Customary Law Question in the South African Constitution' (1996-7) 41 *St Louis U.L.J* 1279 at 1280.

<sup>120</sup> J C Smuts *Africa and Some world Problems* (1930) cited in L Fishbayn 'Litigating the right to Culture: Family Law in the New South Africa' (1999) 13 *Int'l J.L Pol & Fam* 147 at 154.

Culture- the basis for preserving customary law as a distinctive legal system- has ambiguous overtones in the context of Southern Africa. On the one hand culture is of political value for developing an African consciousness. It embraces the African heritage, the means by which Africans can affirm their identity. On the other hand, culture has been the keystone of divide-and-rule politics and of a policy of segregation that subjected all Africans to an outmoded and often oppressive legal regime whatever their individual predilections might have been.<sup>121</sup>

Today, the South African Constitution recognises customary law through its recognition of systems of personal and family law based on any tradition or religion.<sup>122</sup> The Constitution also entrenches the right of persons to use the language and participate in the cultural life of their choice<sup>123</sup> and the rights of cultural and religious communities to enjoy their culture. The institution, status and role of traditional leaders are also given constitutional recognition and the Constitution provides that courts apply customary law when it is applicable.<sup>124</sup>

However, cultural rights are only applicable in so far as their exercise is consistent with the Constitution.<sup>125</sup> This internal limitation of the right to culture and the recognition of customary law in addition of the general limitation on all rights under section 36 of the Constitution is a manifestation of the debates that surround culture and the society's most vulnerable groups, namely women and children.

The paradox that arises from the constitutional entrenchment of the right to culture is something that South African courts have yet to fully address. However, on occasion the courts have been afforded the opportunity to engage with reconciling this seemingly outmoded and oppressive legal system with the new constitutional values. No area of customary law has been subjected to as much constitutional challenge as customary family law.

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<sup>121</sup> Bennett op cit note 109 at 20.

<sup>122</sup> Constitution of South Africa op cit note 6 at s15 (3).

<sup>123</sup> Ibid at s 30.

<sup>124</sup> Ibid s211.

<sup>125</sup> See internal limitations within each of the sections 15, 30, 31 and 211. Also section 2 holds that 'law or conduct inconsistent with the constitution is invalid.

### 3.5 Customary law and children's rights

As stated earlier, objections to the recognition of the right to culture and customary law are often based on the fear that such recognition would validate the discrimination of women and children. As experience has taught, the invocation of the right to culture can be and has often been used to insulate discriminatory practices against vulnerable members of a cultural community from the full impact of human rights review.<sup>126</sup> Any conception of children's rights under customary law was limited to recognition of their welfare rights. Unlike under Western systems of law where the state had an overriding power to protect all children within its jurisdiction, the parent-child relationship in customary law was treated as a domestic matter.<sup>127</sup>

Professor Nhlapo has noted that the link between the family and the traditional value systems of most African societies is not difficult to establish.<sup>128</sup> The family is the foundation on which Africans construct their social lives. As such, the sole purpose of customary law is the preservation of the family unit. The preservation of the family was achieved and maintained through marriage and kinship ties. This was regulated mainly by the men folk in predominantly patriarchal systems in which political leadership and decision making were the prerogatives of male elders.<sup>129</sup> As a result, the rules and institutions that emerged were *about* women and children and not *by* them, making it possible to mask inequalities under the guise of group interests.<sup>130</sup> Women were regarded as perpetual minors under customary law and had no capacity to own or transact in property or even to act as guardians of their own children.<sup>131</sup> The lack of recognition of women and children's legal personality and capacity was a pervasive aspect of customary

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<sup>126</sup> Fishbayn op cit note 120 at 148.

<sup>127</sup> Bennett op cit note 101 at 97.

<sup>128</sup> T Nhlapo 'Cultural diversity, human rights and the family in contemporary Africa: Lessons from the South African Constitutional Debate' (1995) 9 *Int'l J L & Fam* 208 at 211.

<sup>129</sup> Ibid.

<sup>130</sup> Nhlapo op cit note 128 at 212.

<sup>131</sup> Mokgoro op cite note 119 at 1282.

law, evidenced by the fact that the most litigated aspect of customary law in South Africa has been the law of succession.

### 3.6 Equality and the law of succession

The two main rules of succession in customary law are the principle of male primogeniture and universal succession. While many often consider the principle of primogeniture in isolation, it is essential to consider these principles together. These rules were explained in the case of *Mthembu v Letsela* in the following way;

In monogamous families the eldest son of the family head is his heir, failing the eldest son's eldest male descendent. Where the eldest son has predeceased the family head without leaving male issue the second son becomes heir; if he be [sic] dead leaving no male issue the third son succeeds and so on through the sons of the family head. Where the family head dies leaving no male issue his father succeeds...Women generally do not inherit in customary law. When the head of the family dies his heir takes his position as head of the family and becomes owner of all the deceased's property, movable and immovable; he becomes liable for the debts of the deceased and assumes the deceased's position as guardian of the women and minor sons in the family. He is obliged to support and maintain them, if necessary from his own resources, and not to expel them from his home.<sup>132</sup>

In summary, it may be said the rule of primogeniture determines the order of inheritance, excluding females and the young while the rule of universal succession ensures that property is not divided and that the heir inherits both the assets and the liabilities of the deceased.

The South African Constitution guarantees *everyone* equal protection of the law and prohibits unfair discrimination on the grounds of gender, sex, ethnic or *social origin* and *birth*.<sup>133</sup> The principle of non-discrimination is one that is well articulated in the CRC and the African Children's Charter.<sup>134</sup> In addition, the African Children's Charter states that any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in

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<sup>132</sup> *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) at 876.

<sup>133</sup> Constitution of South Africa op cit note 1 at s9.

<sup>134</sup> CRC op cit note 1 at article 2 and ACRWC op cit note 19 at article 3.

the Charter shall to the extent of such inconsistency be discouraged.<sup>135</sup> The rule of primogeniture may be seen as offending the principle of equality. While it is mostly challenged on the basis of gender discrimination, it can be argued that it also discriminates on the basis of age and birth. By privileging the *oldest* (age) *male* (gender) heir, this rule excludes younger male and female children, be they 'legitimate' or 'illegitimate' (birth and social origin) and all other females relatives such as mothers, wives, sisters, and aunts. However, while we may say that the rule discriminates against both males and females at the levels highlighted, in reality, it is women and female children who suffer most under this system. This is especially because of the preference of sons and other male heirs who represent lineage continuity over females who are traditionally expected to marry or remarry into other families.<sup>136</sup>

Given the centrality of the family unit and the perpetuation of the lineage, it may be argued that this is possibly the very reason why women are excluded from inheriting under customary law. In an insightful case note on the case of *Sigcau v Sigcau*<sup>137</sup> which discussed succession to a head of a tribe, Professor Kerr acknowledges that succession in the customary law context is relatively complex especially when perceived through common law eyes.<sup>138</sup> How the courts have attempted to resolve these complexities will be explored through an analysis of the two leading cases on the customary law of succession namely *Mthembu v Letsela and Another*<sup>139</sup> and *Bhe and Others v Magistrate Khayelitsha*.<sup>140</sup>

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<sup>135</sup> ACRWC op cit note 19 article 1 (3).

<sup>136</sup> B Rwezaura 'Domestic Application of International Human Rights Norms: Protecting the Rights of the Girl-Child in Eastern and Southern Africa' in W Ncube (ed) op cit note 2 at 32.

<sup>137</sup> *Sigcau v Sigcau* 1944 AD 67.

<sup>138</sup> A J Kerr 'Customary law, fundamental rights, and the Constitution' (1994) 111 *S. African. L. J.* 720-735.

<sup>139</sup> *Mthembu v Letsela and Another* 1997 (2) SA 936 (T), *Mthembu v Letsela and Another* 1998 (2) SA 675 (T), *Mthembu v Letsela and Another* 2000 (3) SA 867 (SCA) ([2000] 3 All SA 219).

<sup>140</sup> *Bhe and Others v Magistrate, Khayelitsha, and Others; Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* 2005 (1) SA 580 (CC).

### 3.6.1 *The 'triumph' of culture and customary law in Mthembu*

*Mthembu v Letsela and Another* was the first case to challenge the constitutionality of the customary law of succession.<sup>141</sup> In this case, a mother claimed that her seven-year-old daughter born out of wedlock (although this was disputed) had a right to succeed to the child's deceased father's intestate estate. She argued that the principle of primogeniture was unconstitutional as it discriminated on the grounds of sex and a prayer was made for the estate to be settled according to common law.<sup>142</sup> The grandfather, the respondent, challenged this claim asserting that he was the rightful heir under customary law. The High Court upheld the principle of primogeniture and dismissed the constitutional challenge on the basis of the customary law principle. It stated that:

Tembi has no right to inherit intestate from the deceased. That is so simply because she is not the legitimate child of the deceased. It matters not that Tembi is a girl. Even an illegitimate son would have had no right to inherit intestate from the deceased. The disqualification of Tembi to inherit from the deceased in the present matter flows, therefore, from her status as an illegitimate child and not from the fact that she is a girl and that the system of primogeniture is applied in customary law.<sup>143</sup>

Thus, in the courts opinion, the application of the principle of primogeniture did not amount to unfair discrimination on the grounds of sex or gender. Furthermore, any disadvantage faced by Tembi was mitigated by the fact that she was not deprived of her right of support from her guardian i.e. from her mother and her maternal grandparents.

On the argument by the applicants that the Court should develop customary law in accordance with the spirit of the Constitution and the Bill of Rights, the Court stated that the 'development' suggested by the applicants would result in the application of 'western norms to the rule of customary law which is still adhered

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<sup>141</sup> *Mthembu* (1997) supra note 139.

<sup>142</sup> Under South African Common Law in terms of the Intestate Succession Act 81 of 1987 widows of the deceased and his/her legitimate and illegitimate children are entitled to inherit from his/her estate.

<sup>143</sup> *Mthembu v Letsela* (1997) supra note 139 at 686.



to and applied by many African people'.<sup>144</sup> It also felt that any development of the customary law was best suited to the legislature rather than the court.<sup>145</sup>

The applicant appealed to the Supreme Court of Appeal arguing among others that had Tembi been male she would have succeeded to her deceased father's estate. Furthermore, that the customary law rule of primogeniture was offensive to public policy or natural justice within the meaning of the Law of Evidence Amendment Act because it was incompatible with the value of equality.<sup>146</sup> In full agreement with the High Court, the Supreme Court reiterated the assertion that there was no question of gender discrimination given that Tembi was in the same position with male illegitimate children. She was also not 'out of home' since under customary law she belonged to her maternal grandfather or his successor who was obliged to provide for her.<sup>147</sup> In the opinion of the Court, the issue before it was not one in which the recognition and respect of previously acquired rights would be grossly unjust or abhorrent.<sup>148</sup> Both the High Court and the Supreme Court decisions were described as huge blows to the position of the African's child's rights and the best interests in South Africa.<sup>149</sup> It is remarkable that the all three courts implied that discrimination on the basis of age and birth was somehow not as offensive as discrimination on the basis of gender. The reasoning of the court with regard to Tembi's eligibility to inherit from her grandfather was also suspect given that even on her maternal grandfather's side the rule of primogeniture would have still applied and her gender would have still militated against her inheriting.

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<sup>144</sup> Ibid at 688.

<sup>145</sup> Ibid.

<sup>146</sup> *Mthembu v Letsela and Another* supra note 139.

<sup>147</sup> Ibid at paras 37- 43.

<sup>148</sup> Ibid at para 40.

<sup>149</sup> C Himonga 'Implementing the rights of the Child in African legal systems: The Mthembu journey in search of justice' (2002) 9 *International Journal of Children's Rights* 89 at 103.

### 3.6.2 The 'triumph' of the common law in *Bhe and Others*

In the landmark decision of *Bhe and Others v Magistrate Khayelitsha*<sup>150</sup>, the Constitutional Court of South Africa found that the principle of primogeniture was inconsistent with the provisions of the Constitution. The provisions giving effect to it in the Black Administration Act, its regulations and in the Intestate Succession Act were therefore declared unconstitutional and invalid.<sup>151</sup> The facts of the case were similar to those in *Mthembu*. The mother of two minor girls born out of wedlock, sought to assert the right of her children to inherit from their father's intestate estate. However, unlike *Mthembu*, the Constitutional Court expressly recognised that the customary rules of succession discriminated on the basis of sex, age and birth and infringed the constitutional rights of the child. The Court unanimously found that the challenged provisions were unconstitutional and declared them invalid because they adversely affected the rights of women and children.<sup>152</sup> It also noted that as part of official customary law, it was no longer in keeping with the practice, the needs and socio-economic realities of the communities it was meant to serve.<sup>153</sup> It was widely expected that the Constitutional Court would arrive at this conclusion given the widespread criticism of *Mthembu*. A more difficult task however, related to how it was going to fashion the appropriate remedy for the litigants.

While the Court deferred to the legislature on the gap that was to be left by the effect of its judgment in the long run, the Court had to provide interim remedy pending the passage of relevant legislation. Three choices were available to the Court. These were to:

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<sup>150</sup> *Bhe and Others* supra note 140.

<sup>151</sup> *Ibid.*

<sup>152</sup> Black Administration Act section 23 the material provision in the section state the following:  
(1) All movable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom.  
(2) All land in a tribal settlement held in individual tenure upon quitrent conditions by a Black shall devolve upon his death upon one male person, to be determined in accordance with tables of succession to be prescribed under ss (10).

<sup>153</sup> *Bhe and Others v Magistrate, Khayelitsha and Others* supra note 140 at paras [75]-[80].

- develop customary law by determining the true content of 'living' customary law and giving effect to it;<sup>154</sup>
- make exceptions in the implementation of the primogeniture rule which do occur in the actual administration of intestate succession as the applicable rule for customary law succession in order to avoid unfair discrimination and the violation of the dignity of the individuals affected by it. A form of case by case approach.<sup>155</sup>
- apply the Intestate Succession Act.

The majority judgment rejected the first two options arguing that neither definitively guaranteed the protection of women and children's rights when it came to the devolution of intestate estates.<sup>156</sup> The majority was of the opinion that the only just and equitable remedy would be to devolve the estate of the deceased according to the Intestate Succession Act. The dissenting judgment by Justice Ngcobo, however, stated that the Court could and should develop the customary law of succession in accordance with the Constitution and highlighted the fact that the best interests of the child may be better served by applying customary law than the common law.<sup>157</sup>

While it is admitted that, comparatively, *Bhe* was a better judgment to *Mthembu*, both judgments manifest similar flaws. The main criticisms against these decisions rest on two aspects: the manner in which they both apply customary law and their failure/reluctance to develop it, and the manner in which they dismally neglect the best interest principle which is a fundamental principle of both customary and constitutional law.

### 3.7 A critique of both *Mthembu* and *Bhe*

On a close analysis of both judgments, one is struck by the dominance of 'official' customary law in a pluralistic legal system. John Griffiths describes legal pluralism as the situation in which:

'[L]aw and legal institutions are not all subsumable within one(system) but have their sources in the self-regulatory activities of all multifarious social field

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<sup>154</sup> Ibid at [109].

<sup>155</sup> Ibid at [110 -111]

<sup>156</sup> Ibid at [113].

<sup>157</sup> *Bhe and Others v Magistrate, Khayelitsha and Others* supra note 140 as per dissenting judgement of Ngcobo J at p635 – 664.

present, activities which may support, compliment, ignore or frustrate each other'.<sup>158</sup>

Simply put, it is the recognition and application of various systems of law. Academics have drawn a distinction between strong and weak legal pluralism. Weak legal pluralism implies the recognition and application of other systems of law in so far as they are recognised by the state through legislation or case law. This was the case prior to the advent of democracy with customary and religious law being subservient to the common law. On the other hand, strong legal pluralism means the recognition of 'living' law, customs and norms even those not recognised by the state.<sup>159</sup> If the South African legal system characterises itself as a strong plural system, it is disappointing that in these two judgements the High Court, Supreme Court of Appeal and the Constitutional Court all referred to legislation, academic text and opinion to identify customary law applicable to the facts before it when it could have referred to living customary law.

In *Mthembu*, the High Court looked to the academic opinion of Olivier in his text *Privaatreg van die Suid-Afrikaanse Bantoetaalsprekendes*, various pieces of legislation and other academic commentators to establish customary law.<sup>160</sup> The court applied 'ossified' customary law ignoring the dynamic nature of culture and customary law norms. Thus, the Court recognised that while the Intestate Succession Act had removed the prohibition against illegitimate children inheriting from a biological father under European law, but held that such changes had not taken place under customary law.<sup>161</sup> Furthermore, by referring to Professor Bennett's statement that the system of primogeniture was 'one of the most hallowed principles of customary law', the Court misconstrued this statement as a basis for its conclusion that differentiation between men and women under this system did not constitute 'unfair' discrimination.<sup>162</sup> In addition,

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<sup>158</sup> J Griffiths 'What is Legal Pluralism' (1986) 24 *Journal of Legal Pluralism* 1 at 39.

<sup>159</sup> Ibid.

<sup>160</sup> *Mthembu v Letsela* 1997 supra note 139 at 946.

<sup>161</sup> Ibid.

<sup>162</sup> Ibid at 945.

the court noted that even if hypothetically Tembi was legitimate the 'concomitant duty of support' which vested on the heir somehow minimised the discriminatory effect of the rule.<sup>163</sup> A simple application of the test applied by the Constitutional Court in the case of *Harksen v Lane NO and others* would have directed the court to the conclusion that discrimination on the basis of birth/illegitimacy was still discrimination.<sup>164</sup>

By relying on the official version of customary law relating to the duty of support the court failed to take cognisance of the changing reality of many people to whom customary law applies. In the past, families lived in traditional lineage communities that ensured that the heir met his obligations towards the family. Greed and the dislocation of the family homestead changed the enforceability of such duties. The fragility of this duty was obvious on the facts. The respondent grandfather had the clear intention to evict the wife and daughter of his deceased son who had lived under the same roof with him during the lifetime of his son. The South African Law Commission has noted that the reason why South African courts have more often than not preferred to rely on the often inaccurate and misleading official customary law was simply that it is the most readily available and that courts are reluctant to ascertain living customary law.<sup>165</sup> No doubt, this is a regrettable reality.

Thankfully, in *Bhe* the court adequately confronted the changing social realities of women and children. The court made the important point that customary law needed to be interpreted in its own setting and not through the prism of the common law or other systems of law as was the case in the past.<sup>166</sup> According to

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<sup>163</sup> Le Roux J in the 1997 judgment (at 945H - 946C).

<sup>164</sup> *Harksen v Lane NO and Others* 1997 (11) BCLR 1489. In this case the Constitutional Court reiterated what it had said in the *Hugo* case when it noted that the equality proviso served to protect disadvantaged or vulnerable groups and that in its impact test it was essential to look at the 'position of the complainants in society' and whether they had suffered in the past from disadvantage in the past on a specified ground. Of which illegitimate children clearly were.

<sup>165</sup> South African Law Commission *The Harmonisation of Common Law and the Indigenous Law: Succession in Customary Law*, Issue Paper 12, Project 90 (April 1998) available at <http://www.law.wits.ac.za/salc/issue/ip12.html> accessed on 10 January 2005.

<sup>166</sup> *Bhe* supra note 140 at [43].

the Court, such an approach led to the fossilisation and codification of customary law, which in turn led to its marginalisation.<sup>167</sup> Unfortunately, after this very wise and sound statement, the Court proceeded to make the same mistake that had been made in *Mthembu*. Rather than applying the positive aspects of living customary law, which the Court acknowledged had long been neglected, the court resorted to applying the common law in its place.

What is common between *Mthembu* and *Bhe*, however, is the stark reluctance of the courts to develop customary law in line with constitutional values.<sup>168</sup> Both cases rejected sound suggestions to ascertain and apply living law. There is no doubt that the processes involved in ascertaining customary law may be expensive and time consuming.

However, some courts have shown a willingness and ability to ascertain, develop and apply living customary law. In the case of *Mabena v Letsoalo*, the High Court developed the customary law of marriage, which previously stipulated that *lobolo* negotiations had to be conducted by the male relatives of the bride.<sup>169</sup> In this case the mother of the bride had negotiated the *lobolo* and the Court held that the marriage was valid, arguing that it was not repugnant to customary law for a mother, who is the head of the family, to negotiate for and receive *lobolo*.<sup>170</sup>

Furthermore, in *Mabuza v Mbatha*, it was held that customary law of marriage evolved in much the same way as all the other aspects of customary law in accordance with changing socio-economic circumstances.<sup>171</sup> Here, the siSwati custom of *ukumekeza* (the formal integration of bride into bridegroom's family) was said to have evolved in that it was practised differently from what it was in the past and could be waived by agreement of the parties and their families and as such did not affect the validity of a customary law marriage.

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<sup>167</sup> Ibid.

<sup>168</sup> See *Mthembu* (1998) supra note 139 at 685 and *Bhe* at supra note 140.

<sup>169</sup> *Mabena v Letsoalo* 1998 (2) SA 1068 (T).

<sup>170</sup> Ibid.

<sup>171</sup> *Mabuza v Mbatha* 2003 (4) SA 218 (C).

These cases provide ample evidence that customary law is ascertainable and can be developed. Many studies have shown that living customary law of succession has kept up with the changing in socio-economic circumstances of the family.<sup>172</sup> In many communities, the rule of primogeniture has been modified emphasising the importance of succeeding to a deceased family headship, as opposed to inheriting his assets. In this way communities have responded pragmatically to the needs of the deceased's children and their primary caregiver, regardless of whether that person is male or female.<sup>173</sup> By adopting such an approach, the courts would not only be fulfilling their constitutional mandate to develop customary law, but they will also be giving effect to the right to culture of the majority of people who regulate their lives and relationships in accordance with this system of law. The current approach of the Constitutional Court of substituting customary law with common law through the Intestate Succession Act may be criticised as 'killing' customary law 'softly'.<sup>174</sup> Some commentators have argued that since the rule of primogeniture should be preserved because it seeks to strengthen the family rather than the individual and has long been assumed to be the 'keystone of customary law'.<sup>175</sup> Omotola argues that living customary law has long recognised the best interests of the child allowing for families to come up with just and equitable solutions in accordance with values that ensure the continuity and cohesion of the family unit.<sup>176</sup> The main challenge however is how such pragmatism will ensure that children's rights are not compromised as often happens with unwritten systems of law.

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<sup>172</sup> See South African Law Commission Discussion Paper 93 Project 90: Customary Law: Succession August 2000 and also A K Armstrong (ed) *Women and Law in Southern Africa* (1997), C N Himonga *Family and Succession Laws in Zambia, developments since independence* (1995), W Ncube and J Stewart (eds) *Widowhood, Inheritance Law, Customs and Practices in Southern Africa* (1995).

<sup>173</sup> Bennett op cit note 101 at 342.

<sup>174</sup> See M Pieterse 'Killing it softly: customary law in the new constitutional order' (2000) 33 *De Jure* 35-53 and by the same author 'It's a Black Thing' Upholding culture and Customary Law in a Society Founded on Non-racialism' (2001) 17 *SAJHR* 364.

<sup>175</sup> J Omotola 'Primogeniture and Illegitimacy in African Customary Law: The Battle for Survival of Culture' (2004-5) 15 *Ind. Int'l & Comp. L. Rev.* 115 at 126.

<sup>176</sup> *Ibid* at 144.

Since customary law possesses discriminatory practices and customs such as the ones we have discussed and we criticised the approach of the Court in the seemingly positive judgment of *Bhe*, how then should the right to culture and children's rights be reconciled, if at all that is possible? It will be argued that the principle of the best interests of the child provides the benchmark for resolving this issue.

### 3.7.1 *The best interests of the child*

The best interest principle is the foundational principle in children's rights law articulated in international, regional and domestic law. In South Africa, this principle has been freed from its traditional application in the law of custody and now applies in all areas where children's interests are considered.<sup>177</sup> However, what constitutes the best interests of the child will always depend on the facts of each case. In light of its importance to South African Constitutional law. It is interesting to note that no mention was made about what was in the best interests of Tembi in the *Mthembu* case. In *Bhe*, while the court refers to the paramountcy clause, it does not engage with it or apply it to the facts before it. The only attempt to deal with this principle, albeit indirectly appears in the dissenting judgment of Justice Ngcobo. In the learned judge's view the appointment of an *indlalifa* 'where there are minor children it may therefore be in their *best interests*, in certain circumstances, that indigenous law be applied'.<sup>178</sup> This may be so whether or not the deceased is survived by dependents but leaves no assets to maintain and support them. The learned judge makes some very insightful comments about the role of the African customary law of succession in catering for the needs of the vulnerable, young and old. By making

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<sup>177</sup> *Bannatyne v Bannatyne (Commission for Gender Equality as Amicus Curiae)* 2003 (2) SA 363 (CC) (2003 (2) BCLR 111), *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 (1) SA 406 (CC) (2003 (12) BCLR 1333), *Metiso v Padongelukfondo* 2001 (3) SA 1142 (T), *Christian Lawyers Association v Minister of Health and Others (reproductive Health Alliance As Amicus Curiae)* 2005 (1) SA 509 (T), *Du Toit v Minister of Welfare and Population Development (Lesbian & Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) (2002 (10) BCLR 1006),

<sup>178</sup> *Ibid* at [243].



reference to the family as a unit, the learned judge makes an important point about African traditional values.

### 3.7.2 *The extended family and the best interests of the child*

One may argue that the majority of the Court in *Bhe* was of the opinion that it was in the best interests of the children for their father's estate to devolve under the Intestate Succession Act, thereby making the children the sole heirs of the estate. Justice Ngcobo, however, looks at the bigger picture which considers many other estates that may or may not have assets to be fought over. He argues that the application of customary law *and* the Intestate Succession Act may serve the best interest of the child in two ways. Firstly, whether or not the estate has assets, there will be someone charged with the maintenance of the children in the form of an *indlalifa* who in living customary law can either be female or male.<sup>179</sup> Secondly, the learned judge recognises that it is always in the best interests of the child for the family unit to be protected and kept intact. International, regional and domestic human rights instruments all recognise that the family environment is the best for children. In one of her articles on customary law Justice Mokgoro has noted that despite the erosion of the family unit senior male relatives, at times remotely related, are still enabled by customary law to succeed communal family estates and more often than not, leave women and children destitute.<sup>180</sup> In both *Bhe* and *Mthembu* the respondent grandfathers perfectly fell into this category as they attempted to evict and sell the property of the deceased to the detriment of the surviving spouses and children. It is indeed unfortunate that in some cases customary law heirs abuse and neglect their duties. However, the actions of these should not undermine the numerous undocumented cases of good practice where heirs maintain the dependents of the deceased, even at their own expense.

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<sup>179</sup> Research by The Women and Law in Southern Africa Research Trust (WILSA) which has made extensive research into various laws of southern Africa has shown that living law still emphasizes the importance of succeeding to a deceased family head as opposed to simply inheriting his assets and that it responds more pragmatically to the needs of the deceased's children and their primary caregiver. See Watney (1992) 25 *CILSA* 379 and Bennett *Customary Law in South Africa* (2004) at 342.

<sup>180</sup> Y Mokgoro op cit note 119 at 1282.

At the heart of Justice Ngcobo's dissent is that courts should not negate their duty in assessing the best interests of the child as the paramount consideration. Additionally, he argues that while children are important and vulnerable, resources are naturally distributed to ensure that other persons who depended on the deceased for their welfare are also catered for.<sup>181</sup> This is something that the Intestate Succession Act does not cater for as it only recognises the right of the nuclear family to inherit. Only in exceptional circumstances will other family members be recognised. The attitude of the Court in applying the common law can be seen as facilitating the disintegration of not only customary law but of the African family unit as inheritance becomes an issue of individual ownership rather than stewardship for the preservation of an entire kinship group.

Professor Himonga has correctly argued that inheritance rights must not be seen merely as a matter of rights that should be protected by law as such, but also as a way of realising the child's right to life and survival.<sup>182</sup> She notes that in many instances the inherited property constitutes a major, if not the only source of material support of the deceased's children and other dependents. She further notes that kinship solidarity and mutual support obligations have increasingly given way to individualism due to changing social and economic conditions.<sup>183</sup> As such, protecting the interests of the individual family members will require the state to remove discriminatory obstacles that prohibit certain children from inheriting from estates of their parents.

In other instances, however, giving effect to this right will entail supporting and facilitating positive customary practices which allow for children's welfare to be

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<sup>181</sup> R Rwezaura 'The Concept of the Child's Best Interest in the Changing Economic and Social Context of Sub-Saharan Africa' in P Alston (ed) *The Best Interests of the Child: Reconciling Culture and Human Rights* (1994) 82 at 111. He notes that the growing category of children living in AIDS ravaged areas in Africa means that the economic burden of supporting these children has fallen on their aged grandparents and other relatives, who have also lost the economic support originally obtained from the dead parents of these orphans.

<sup>182</sup> C Himonga 'Protecting the minor child's inheritance rights' (2001) *The International Survey of Family Law* 457.

<sup>183</sup> *Ibid* at 458.

fostered and encouraged whatever condition the deceased's estate is in. The current approach of the courts in both *Mthembu* and *Bhe*, if anything, does not foster the cohesiveness of the family unit. The family, especially in African culture, provides individuals with not only a sense of belonging and identity but is an incredible support system for the young and the old in a society where old peoples homes and orphanages are not a viable option either because of cultural perceptions of such institutions or simply because of lack of resources. The family remains the institution *best* suited for the welfare of children. It is therefore important for courts and legislators to take cognisance of such cultural values in their decisions and articulation of what may be in the best interests of the child.

### **3.8 Conclusion**

It has been said that if society is to be open and democratic in the fullest sense it need to be tolerant and accepting of cultural pluralism.<sup>184</sup> Like many countries in the world that esteem a real protection and celebration of diversity, South African jurisprudence on the right to culture and children's rights shows that the realisation of ideal is a challenge. This chapter has shown that while South Africa has come a long way in accommodating and protecting the right to culture and cultural diversity, the emergence of a constitutional democracy has not adequately solved some of the more difficult questions. Is it possible to accommodate different conceptions of children's rights and remain true to the constitutional values? It has shown that cultural values influence societal perceptions of children and their entitlements within the family under the customary law and these values in turn impact on children's constitutional rights. As a result of these tensions it is evident that in the battle between articulating the right to culture and the rights of the child, South African courts have negated the application of the best interest principle. Culture, in particular customary law, has been perceived as static and unable to respond to changes in social and political realities, therefore unable or willing to cater to the changing needs of

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<sup>184</sup> *Christian Education South Africa v Minister of Education* supra note 108.

children and their families. There is no doubt that in some instances customary law, as we know it or as it is applied by the court, has failed to keep up with these emerging conceptions of children and their rights.

Justice Sachs has rightly argued that in order to regain its vitality, customary law must respond to the lives that people lead now and their sense of justice and fairness.<sup>185</sup> The denial of the rights of women and children under customary law can no longer be justified under the guise of cultural paternalism which has resulted in some of the worst forms of abuse and neglect of women and children. The family, as it is understood in each society, must be supported and protected to cater for the best interests of each of its members. In African societies this may be all vulnerable members of the extended family. To facilitate this, the courts must not shirk their constitutional mandate to 'develop' the law. The continued use of official customary law may perpetuate the marginalisation of customary law frustrating those who regulate their lives according to this law as part of their right to culture.

The positive aspects of customary law of succession must be given effect to and infused in each judgement of the court where this law is applicable. The value of ubuntu requires a balancing of the interests of society with those of the individual. This paper has argued that through the best interests' principle, the right to culture and children's rights can be reconciled to ensure the well-being of both interests. If we abide by the phrase '*umuntu ngumuntu ngabantu*' we can say that a child is a person because of his/her community, without children the community ceases and without the community the child has no hope. It is therefore important that where the application of customary law better serves the best interests of the child, this law, as developed by the courts in keeping with the constitutional values, must be applied. Where the courts are unable to develop customary law by either referring to living law or infusing the children's rights principles, the community affected must participate in reaching a solution that gives primacy to

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<sup>185</sup> Sachs op cit note 96 at 15.

the best interests of the child. While this chapter has focused on children's rights in the context of customary law and the right to culture the next chapter will explore the issue of religion and the rights of the child.

## CHAPTER IV

### FREEDOM OF THOUGHT, CONSCIENCE AND RELIGION AND THE BEST INTERETS OF THE CHILD

'The power of a parent to direct the religious upbringing of a child, even when linked to a claim of free exercise of religion, may be subject to limitation if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.'  
Wisconsin v. Yoder (1972)

#### 4.1 Introduction

As we shown in the previous chapter the protection of traditional values in international and domestic law embraces indigenous or ethnic value systems but also religious customary practices, traditions and, perhaps, institutional values.<sup>186</sup> In addition to the right to culture, it recognised that freedom of religion raises some contentious questions in children's rights discourse.<sup>187</sup> If the family is the crucible for the transmission of religious and cultural beliefs as we noted in the second chapter, it is important to explore the influence that religious beliefs have on the rights of the child. Like many other jurisdictions in the world, the influence of religious values in South Africa is evident in case law relating to custody, education and medical treatment. Because of the breadth of this issue this chapter will only explore the influence of religion in the contentious area of education.

The importance of analysing South African jurisprudence on children's rights and freedom of religion is that it brings to bear some of the complex questions that were cursorily touched upon in the second and third chapters. If the family is rightly recognised as the entity that is best equipped to cater for the best interests of the child since the state is too crude and instrument to deal with the changing needs of the child<sup>188</sup>, when and how is government intervention in the parent-child relationship ever justifiable? When it comes to the issue of child rearing parents have a wide discretion and constitutionally protected

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<sup>186</sup> Van Bueren op cit note 5 at 16.

<sup>187</sup> Ibid.

<sup>188</sup> J Goldstein, A Freud and A J Solnit *Before the Best Interests of the Child* (1979) at 11-12 and *Beyond the Best Interests of the Child* (1973) at 9.

rights which give them considerable influence over the day to day lives of their children making important decisions relating to the day to day lives of their children. Like cultural values, religious or philosophical values of the parents may at one time or another clash with state law or constitutional values that attempt to give effect either to the rights of the child or to the state's conception of the best interests of the child. Balancing these sometimes conflicting interests is often a challenge that most jurisdictions have to confront. This chapter attempts to explore South Africa's attempt to balance these interests. However, as we did in the previous chapter, before we explore the case law on children's rights, it is important that we have a clear understanding of freedom of thought, conscience and religion and its interaction with the rights of the child.

## **4.2 Defining freedom of religion**

The Human Rights Committee has noted that freedom of religion, thought and conscience is far-reaching and profound and that it encompasses freedom of thought in all matters, personal conviction and the commitment to religion or belief manifested individually or communally.<sup>189</sup> This right protects theistic and non-theistic beliefs, as well as the right not to profess any religion or belief. International jurisprudence on article 18 of the ICCPR, which recognises religious rights, has shown the breadth of this right in relation to a wide range of issue such as parental beliefs<sup>190</sup>, the rights of religious minorities<sup>191</sup> and objections of the use of taxes and many other worldview issues.<sup>192</sup> It is also recognised that in international law it is almost impossible to consider freedom of religion outside

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<sup>189</sup> General Comment No. 22: The right to freedom of thought, conscience and religion (Art. 18). 30/07/93. CCPR/C/21?Rev.1/Add.4, General Comment No 22 para 2 accessed at [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/9a30112c27d1167cc12563ed004d8f15?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/9a30112c27d1167cc12563ed004d8f15?Opendocument) on 10 January 2006.

<sup>190</sup> *Efstathiou v Greece* Judgment of the ECtHR, 18 December 1996. *Lippmann v France* Communication No.472/1991, HRC. 1996 Report, Annex IX.A. 778.

<sup>191</sup> *M A B, W A T and J -A Y T v Canada* Communication No. 570/1993. April 25, 1994.

<sup>192</sup> *J P v Canada* UNHRC: UN Human Rights Committee. Communication No 446/1991. 7 November 1991, *K V and C V v Germany* Communication No. 568/1993, U.N. Doc. CCPR/C/50/D/568/1993 (1994).

the realm of family life. The right has both individual and communal aspects, especially as it relates to children and their parents.

At the local level, section 15 of the South African Constitution contains a provision protecting freedom of religion that is almost identical to article 18 of the ICCPR. For our purposes the most important provisions of the section states that:

- (1) Everyone has the right to freedom of conscience, religion, thought, belief and opinion.
- (2) Religious observances may be conducted at state or state-aided institutions, provided that -
  - (a) those observances follow rules made by the appropriate public authorities;
  - (b) they are conducted on an equitable basis; and
  - (c) attendance at them is free and voluntary.

In *S v Lawrence*; *S v Negal*; *S v Solberg*<sup>193</sup>, the Constitutional Court defined freedom of religion as encompassing

'[T]he right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.'<sup>194</sup>

In addition to this, the Court also noted that the right implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs.<sup>195</sup> Judge O'Regan, in the same case, however argued that the constitutional right requires more of the Legislature than it to refrain from coercion but also required 'fairness and even-handedness in relation to diverse religions is a necessary component of freedom of religion'.<sup>196</sup> In light of this definition and our understanding of this right in international law, it is interesting to note that the right to freedom of religion has been the subject of litigation in a number of cases concerned with the rights of children. The majority of cases have shown that this right, like all other rights in the Constitution, is not absolute and subject to

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<sup>193</sup> *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC).

<sup>194</sup> *Ibid* at para [92].

<sup>195</sup> *Ibid*.

<sup>196</sup> *Ibid* at para [128].



limitation.<sup>197</sup> It is also interesting to note that a large number of cases that have decided in respect of this right concern the rights of parents and children. It is therefore important to consider the possible tensions that exist between the exercise of this right and the rights of children.

### 4.3 Freedom of religion and children's rights

The CRC contains numerous references to religion that have considerable impact on our understanding of children's rights. For instance, article 20 which deals with alternative care and adoption, states that due regard should be paid to the desirability of continuity in a child's upbringing and that notice should be taken of child's ethnic, *religious*, *cultural* and linguistic background.<sup>198</sup> In addition, article 30 provides that in those states where religious and cultural minorities exist, children belonging to such groups must not be denied the right, in community with other members of his/her group, to profess and practice his or her own religion.<sup>199</sup> Article 1 of the Convention states that rights shall apply to each child within the jurisdiction of State Parties without discrimination of any kind such as, the religion to which the child or his parents adhere.<sup>200</sup> Indeed while a number of provisions relating to religion are directed at the child's right, a considerable number of provisions recognise the religious rights of parents in the upbringing of children. For instance article 5 calls upon states to respect the responsibilities, rights and duties of parents and other family members as provided for by local custom to provide appropriate direction and guidance to children. Article 14 which deals with the child's freedom of religion, thought and conscience, the CRC reiterates the rights and duties of parents to provide direction to the child. However, as is the case under the common law, parental religious right are not only subject to limitation by the court in its role as *parens*

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<sup>197</sup> Constitution of South Africa op cit note 6 at s36 contains the general limitation can also be limited by section 31 also provides that the rights of a religious community may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

<sup>198</sup> CRC op cit note 1 at article 20.

<sup>199</sup> Ibid article 30.

<sup>200</sup> Ibid article 2 (1).

*patriae* but with the recognition of children's right imposes a further curtailment of parental rights. For instance, the CRC states that:

Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>201</sup>

The issue of child participation when the child has reached maturity and the best interests' principle which should be applied in all matters affecting children therefore fundamentally alter traditional parent-child relations as we know them. It is therefore crucial that we consider the potential areas of conflict that may arise between children's rights and parental religious rights and how South African courts have attempted to resolve these issues under the new Constitution.

#### **4.4 Rights, responsibilities and duties**

It is interesting to note that with the advancement of children's rights the entire discourse of children rights has brought with it a change in terminology. The CRC for instance refers to terms *rights*, *responsibilities* and *duties* of parents and families.<sup>202</sup> In the past and to some extent today, the term parental power was commonly used in South African case law that dealt with parents, their children and the law. Parental power was defined as the complex of rights, powers, duties and responsibilities vested in or imposed upon parents, by virtue of their parenthood, in respect of the minor child.<sup>203</sup> Today however, the term parental power has found disfavour in children's rights discourse as the emphasis has moved from the power relationship between parent and child, state and parent to the rights and interests of children.<sup>204</sup> However, this does not mean that parents do not have *rights* in so far as their children are concerned in as much as children have rights where their parents are concerned. In most jurisdictions parents have legally recognised and enforceable rights of custody, access and

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<sup>201</sup> CRC op cit note 1 at article 12.

<sup>202</sup> Ibid articles 5, 14, 18 and 27.

<sup>203</sup> *Krugel v Krugel* 2003 (6) SA 220 (T).

<sup>204</sup> See Van Heerden et al (eds) *Boberg's Law of Persons and the Family* 2<sup>nd</sup> ed (1999) at 313-316.

other rights that come with the recognition of family life and which enable then to carry out their parental duties. For instance parents have responsibilities towards their children in the area of their general upbringing and make various decisions about the health, education, the physical and emotional welfare. Parents and not the state or the children themselves often have the final say when it comes to the language that a child is to be brought up in, where the child should live, who the child may associate with, the school he/she is to attend and other day to day issues such as discipline.<sup>205</sup> While these child rearing issues have traditionally been left to parents with very limited intervention by the state, parental rights, duties and responsibilities are frequently coming under scrutiny. This is evident in a number of South African cases, however, the case that will be focused on in this last chapter will relate to parental decision making *rights* with regard to education.

#### **4.5 Parental religious rights and education**

If one concedes that the primary obligation for the welfare of the child rests with his or her parents, it follows that parents have the primary responsibility for the education of their children and that they have legally recognised rights in this regard. The Universal Declaration of Human Rights contained a provision which stated that parents have a 'prior right to choose the kind of education that shall be given to their child'.<sup>206</sup> The ICESCR and the ICCPR reiterate these sentiments by stating that State Parties should respect the liberty of parents and guardians to choose for their children's, the schools which conform to their religious and moral convictions.<sup>207</sup> The South African Constitution gives effect to the rights of parents in the area of education by allowing the establishment of independent educational institutions.<sup>208</sup> Even within this framework consultative forums are constituted in each school which allow parent involvement in various aspects of

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<sup>205</sup> DSP Cronjé and J Heaton op cit note 58 at 277.

<sup>206</sup> Universal Declaration of Human Rights op cit note 104 at article 26.3.

<sup>207</sup> ICESCR article 13. 3 and ICCPR article 18.4.

<sup>208</sup> Constitution of South Africa s29 (3).

the school's functioning and the content of the curriculum.<sup>209</sup> As regards public schools, the Schools Act<sup>210</sup> stipulates that religious observances should be conducted on an equitable and voluntary basis.<sup>211</sup> It must be noted that while the constitutional and legislative provisions may provide guidance with regard to formal education, it is important to bear in mind that broadly speaking, education in so far as religious rights are concerned, involves both religious (in the broad sense) education in the home and in the formal educational system.

Given our definition of the right is and the aim of this chapter in assessing the extent to which South African children's rights jurisprudence accommodates diversity it is important that we consider how the courts have dealt with these two issues.

#### *4.5.1 Religious education by parents*

As we have already stated above, the responsibility of the religious upbringing of a child primarily rests with the parents. In South African law, the issue of religious instruction by parents often emerges in cases dealing with custody.

In the case of *Allsop v McCann*<sup>212</sup>, the Cape High Court held that parents have the right to direct the religious and secular education of the children. The case concerned two minor children whose parents had been married in the Roman Catholic Church. Upon dissolution of the marriage, the mother who had custody of the children, rejected the formal teaching of organised religion and as a result, objected to the children's attendance to church during the access period of the father. The Court held that both parents were entitled to provide religious instruction. It stated that any restriction on the non-custodian parent's rights and duties would fundamentally alter the inherent rights of that parent.<sup>213</sup> Thus, the court was of the opinion that both parents had the right to provide religious

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<sup>209</sup> South African Schools Act 84 of 1996 section 18.

<sup>210</sup> Ibid.

<sup>211</sup> Ibid at s 7.

<sup>212</sup> *Allsop v McCann* 2001 (2) SA 706 (C).

<sup>213</sup> Ibid at 714C/D - F/G.

instruction to the children when the children were in their charge and the religious influence of one parent had no bearing on the rights of the other. The view of the court can be contrasted with the statement in *Krugel v Krugel*, which suggested that when it came to matters such as choice of school, religious instruction and medical care, the non-custodian parent had no right to interfere with the decisions of the custodian parent.<sup>214</sup>

By recognising the rights of both parents in relation to the religious instruction of their children, the Court was evidently weary of eroding the religious rights of the either parent which are recognised at common law and are inherent in the Constitution. According to the court, the only instance a court would intervene to limit these rights would be when the exposure to the philosophical or religious beliefs of the parent would be harmful to the child.<sup>215</sup> On the facts before it, the court was of the view that, exposure to both parents' worldviews would place them in an 'eminently good position' to decide for themselves when they could make such decisions for themselves.<sup>216</sup> While the Court does not engage in an analysis of the best interests of the child, it is evident that the Court was of the view that the best interests of the child were best served through an exposure to a wide range of religious approaches. However, Bonthuys and Pietrse have argued that courts should be reluctant to allow religious disputes between parents to confuse and upset children and, where possible, children who have been brought up in a certain religion should not be exposed to different pressure from the other parent.<sup>217</sup> Cronjé and Heaton have also argued that where differences in religious instruction can cause confusion to the children, the court should intervene and decide what is in the best interests of the child.<sup>218</sup>

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<sup>214</sup> *Krugel v Krugel* supra note 203 at 224.

<sup>215</sup> *Allsop* supra note 212 at 715.

<sup>216</sup> *Ibid.*

<sup>217</sup> E Bonthuys and M Pietrse 'Divorced Parents and the Religious Instructions of their Children: *Allsop v McCann*' (2001) 118 *South African Law Journal* 216 at 222.

<sup>218</sup> DSP Cronjé and J Heaton op cit note 58 at 280.

The issue of what constitutes the best interests of the child in the area of religious instruction continues to be a challenge in many cases. Such was the case in *Kotze v Kotze* where the court took an interesting approach to the religious rights of parents and children.<sup>219</sup> In this case the Transvaal High Court was confronted with a divorce custody settlement between the parents of a three year-old boy. The settlement read as follows:

Both parties undertake to educate the minor child in the Apostolic Church and undertake that he will fully participate in all the religious activities of the Apostolic Church.<sup>220</sup>

The Court declined to make the clause a part of the divorce order, holding that the clause was unenforceable and not in the interests of the child. In the Court's view, the clause did not afford the child the freedom that he was entitled to under the Constitution and placed him in 'constraints from which he might never be freed'.<sup>221</sup> In its view, the clause represented indoctrination of the child and a slavish adherence to certain often repeated canons that essentially negated and destroyed a person's freedom of choice.<sup>222</sup> The court stated that:

If a child is forced, be it by order of the parents, or by order of Court, to partake fully in stipulated religious activities, it does not have the right to his full development, a right which is implicit in the Constitution, and which is expressly referred to in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, which is part of the United Nations Convention on the Rights of the Child, of which the State is a signatory.<sup>223</sup>

One must argue that in light of the reasoning in *Allsop* the courts stance parental religious rights and children's rights deserve some comment.

As stated earlier, the CRC recognises the rights of children and the rights and responsibilities of parents in guiding and directing the exercise of fundamental rights. Like the rights of parents, the CRC recognises that parental rights are not absolute and must be exercised in the best interests of the child, taking into account the maturity of the child and his/her ability to make independent religious

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<sup>219</sup> *Kotze v Kotze* 2003 (3) SA 628 (T).

<sup>220</sup> Ibid.

<sup>221</sup> Ibid at p631.

<sup>222</sup> Ibid.

<sup>223</sup> Ibid at 632.

decisions.<sup>224</sup> On the facts of *Kotze*, the Court was dealing with a 3 year-old child who had not attained the maturity necessary to make an independent decision on religious instruction. Parental guidance in the area of religion, as with any other aspect of bringing up children, cannot be seen as indoctrination by parents as this would have far-reaching implications. Adherence to a particular diet or the inculcation of a particular language in minor children cannot surely be classified as indoctrination as many aspects of the socialisation process would fall foul of the rights of the child. There is no doubt that the intent of the parents by their agreement was not to place 'constraints' on the child, which would limit his freedom when he reached maturity. Indeed while many people do end up following the religious paths of their parents, many do not and for a variety of reasons, end up following their own paths.<sup>225</sup>

Labuschagne, Bekker and van Zyl have argued that while religious beliefs are relevant in determining the best interests of the child, a court cannot use religious beliefs to disapprove of parental decisions except where a parental decision, premised on religious tenets, manifests a total disregard for the welfare of the child.<sup>226</sup> On the facts of *Kotze*, it is difficult to conceive of how the clause may have undermined the rights of the child, unless it was shown that it purported to be binding on the child him/herself for all her childhood. Labuschagne *et al* have argued that to aver that it is a constitutional principle that a child should grow up in a religious vacuum is tantamount to state interference in the private practice of religion.<sup>227</sup> It may be argued that when it comes to religious instruction by parents within the home, respect for the religious rights of the parental role entails a certain degree of accommodation by the courts as evidenced by *Allsop*. This is not to say that parents have a carte blanche over their children rather, at all time the guiding principle should be what is in the best interests of the child and

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<sup>224</sup> CRC op cit note 1 at article 14 (2).

<sup>225</sup> *Allsop* supra note 212 at 715.

<sup>226</sup> JMT Labuschagne, JC Bekker and GJ van Zyl 'Parental Rights to Participate in a Child's Personality Development and its Religious and Moral Upbringing and the Child's Rights to Freedom of Choice: Observations on the Field of Tension Caused by the Irrational in a Human Rights Dispensation' (2004) 25 *Obiter* 41 at 52.

<sup>227</sup> *Ibid* at 55.

whether there is any potential harm with the exercise of parental rights. While the issues may be relatively easy to resolve when it come to relatively younger children, the CRC provides guidance that children's voices must be heard were possible. It is a reality that children must be allowed to participate in both private and public decision making processed that affect them.

However, while the issue of parental rights in the educations of their children within the home is complex, the issue of parental religious rights in formal education raise even more profound questions about the extent to which South African law accommodates difference.

#### *4.5.2 Parental rights in secular education*

The issue of parental rights over the education of their children has received a considerable amount of attention since the establishment of the state. As we have already noted at common law parents have the final say to determine the education of their children. In the past parents decided whether their children attended school and which type of schooling they were to embark on. It is said that at common law a father was under no obligation to have his child educated; he could put him to work in a factory or a mine when hardly more than an infant.<sup>228</sup> Nevertheless, it was only when the exercise of this right by the parent was unreasonable or capricious that the State dared to intervene. Municipal law and international law recognised the rights of parents to influence the education of their children by taking them or establishing independent schools which allowed the parent to exercise his/her rights by instructing his child through the linguistic or religious medium of his choice.<sup>229</sup> In the American case of *Meyer v. Nebraska*, the Supreme Court held that several state statutes prohibiting the teaching of German to elementary school children interfered with 'the power of

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<sup>228</sup> *Swart, NO and Nicol, NO v De Kock; Swart, NO and Nicol, NO v Garner and Others* 1951 (3) SA 589 (A).

<sup>229</sup> *Ibid.*



parents to control the education of their own.<sup>230</sup> Today, the South Constitution and various pieces of legislation, while making education compulsory, allow for the establishment of independent and state schools from which children can receive an education. Parents who fail to comply with provisions that provide for the compulsory education of their children can be found guilty of an offence.<sup>231</sup>

Within the confines of the law parents have a considerable say in the education of their children. It must be noted that with the change in lifestyle and socio-economic circumstances more and more parental duties, care and responsibilities are being shifted onto other bodies such as day care centres and schools. When it comes to education, parents effectively pass on a crucial degree of influence over their child's development to someone else. Some parents thus send their children to religious schools purely on the basis that such schools will educate their children in accordance with their deeply held religious or cultural beliefs. Others however, may not be able to afford such schools and will send their children to state schools.

There is often a degree of tension between the beliefs of the parents and the policy of the state or private school. Parental objections may arise with regard to the teaching of a particular religion or the content of various aspects of the curriculum.<sup>232</sup> For example, recently, the use of certain types of books such as the Harry Potter series in the school curriculum has been seen by some parents as encouraging an interest in the occult.<sup>233</sup> The infliction or non-infliction of

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<sup>230</sup> *Meyer v. Nebraska*, 262 U.S. 390 (1923) at 401.

<sup>231</sup> South African Schools Act 84 of 1996 s3 (6).

<sup>232</sup> L Lundy 'Family values in the classroom? Reconciling parental wishes and children's rights in State Schools' (2005) 19 *IJLP & F* 346 at X. See also South African media articles 'Condoms at schools a reckless experiment' *Mail and Guardian* 13 January 2006 accessed at [http://www.mg.co.za/articlePage.aspx?articleid=261246&area=/breaking\\_news/breaking\\_news\\_national/](http://www.mg.co.za/articlePage.aspx?articleid=261246&area=/breaking_news/breaking_news_national/) on 15 January 2006 and K Cullinan 'No condoms at Schools, say African educators' *Mail and Guardian* 31 August 2004 at [http://www.mg.co.za/articlepage.aspx?articleid=136231&area=/breaking\\_news/breaking\\_news\\_africa/](http://www.mg.co.za/articlepage.aspx?articleid=136231&area=/breaking_news/breaking_news_africa/) accessed on 15 January 2006.

<sup>233</sup> See 'Christian School bans 'evil' Potter magic' 2 July 2003 accessed at [http://www.iol.co.za/index.php?set\\_id=1&click\\_id=3&art\\_id=qw1057113361339B241](http://www.iol.co.za/index.php?set_id=1&click_id=3&art_id=qw1057113361339B241) on 10 January 2006.

corporal punishment in the educational system has also raised parental concerns depending on the beliefs of the parents. Therefore, there is a considerable range of issues that bring the beliefs and rights of parents, the child and the role of the state to the fore. While the aspects of education that are controversial seem to be limited in South African jurisprudence, we will also consider the more controversial issue in comparable jurisdictions.

In the case of *Wittmann v Deutscher Schulverein, Pretoria*, the Transvaal High Court had to deal with a case concerning an exception from mandatory religious instruction.<sup>234</sup> The mother of a minor made an application to the court to have her daughter exempted from religious classes on the basis that the religious instruction offered by the independent German school, was not in accordance with her beliefs.<sup>235</sup> From the facts of the case it is not clear whether the child shared the religious convictions of her mother but one may infer from one of the incidences she that she did. The court however approached the matter from the parental right perspective and noted that while section 14, freedom of conscience, religion, thought, belief and opinion, afforded the parent the right to have a her daughter exempted from attendance at religious instruction classes and observances, by subjecting herself to the school constitution and regulation, the mother had effectively waived her ancillary right for her daughter not to attend these classes.<sup>236</sup>

While the *Wittmann* was decided on such a narrow point, it is debatable whether the child herself was bound by her mother's waiver. The case is made more complex by the fact that the court was dealing with a private school and not an organ of state as there is no doubt that had the school been an organ of state the actions of the school in providing compulsory religious education may have been suspect. Given that it was an independent institution established for the

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<sup>234</sup> *Wittmann v Deutscher Schulverein, Pretoria, and Others* 1998 (4) SA 423 (T) (1999 (1) BCLR 92).

<sup>235</sup> *Ibid* at 431.

<sup>236</sup> *Ibid* at 447-456.

main purpose of transmitting German linguistic and cultural heritage intervention by the State would have been unconstitutional. In other jurisdictions, control over the content of the school curriculum and activities remains an important issue for families with deeply held religious beliefs.

In the United States for example, since the early cases of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, in which the Supreme Court confirmed that, while the State had a valid interest in ensuring that children receive some form of education, it could not seize the parents' primary duty to direct that education'.<sup>237</sup> Today, the relationship between the state and parents is constantly under pressure with parents questioning the role of the state on a number of key educational issues. Not only in the United States but in Europe and even in South Africa the content of 'health education', 'sex education' or 'life orientation' classes has raise questions about the values children are taught.<sup>238</sup>

In the *Danish Sex Education* case, the European Human Rights Court found that the integration of sex education into the school curriculum, from which children could not be excused, did not constitute a failure to respect parent's convictions on the matter.<sup>239</sup> Kilkelly has argued that, in this case, the manner in which the instruction was provided was decisive as it did not attempt to indoctrinate a particular moral attitude, but merely conveyed information.<sup>240</sup> In the courts view the integration of the subject into the school curriculum did not affect the parents' right to

Enlighten and advise their children, to exercise with regard to their children natural parental functions as educators or to guide their children on a path in line with their own religious and philosophical convictions.<sup>241</sup>

In other instances cases have arisen in the United States and in Canada in which the state has sought to exert more influence over the content of the

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<sup>237</sup> E Zimmerman 'Defending the parental right to direct education: Meyer and Pierce as bulwarks against state indoctrination' (2004-2005) 17 *Regent U. L. Rev* 311 at 311.

<sup>238</sup> Ibid.

<sup>239</sup> *Kjeldsen, Busk Madsen & Pedersen v Denmark*, Comm Rep, 21.3.75, Series A no 23.

<sup>240</sup> U Kilkelly *The Child and The European Convention on Human Rights* (1998).

<sup>241</sup> *Kjeldsen, Busk Madsen & Pedersen* judgment of 7 Dec 1976, Series A no 23, 1 EHRR 711at 45.

curricula and the manner of instruction used by home schooling parents.<sup>242</sup> In the American case of *Wisconsin v Yoder*, Amish parents claimed that Wisconsin's compulsory education law, which required parents to ensure that their children attend public or private school until the age of sixteen, violated their free exercise rights.<sup>243</sup> The parents argued that their faith required them to raise their children for 'life in a church community separate and apart from the world and worldly influences' and that attendance at a regular high school would expose their children to worldly influences during the crucial adolescent stage of development, developing values rejected as influences that alienate man from God.<sup>244</sup> The Court held the law affirmatively compelled the parents, under the threat of criminal sanction to perform acts undeniably at odds with fundamental tenets of their religious beliefs and that the State had to show that it had an interests 'of the highest order...not otherwise served' in applying its regulations to the Amish, however reasonable those regulations might be as a means of securing an appropriate education for children.<sup>245</sup> The state had not provided sufficient evidence to show that overriding the religious rights of the parents was necessary to further its interests, and so awarded the Amish an exemption from compulsory school attendance laws.<sup>246</sup>

*Yoder* effectively held that aspects of religious parenting are especially deserving of constitutional protection. As a result, in the United States parental rights have been recognised and protected under the Fourteenth Amendment from unnecessary state interference in four areas: (1) educational choices; (2) religious matters; (3) citizenship, including morals; and (4) issues concerning

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<sup>242</sup> See for example the Canadian case of *Family and Children's Services of Cumberland County v. G.C.* (1998), [1999] 171 N.S.R. (2d) 324, 519 A.P.R. 324 (N.S. Fam. Ct.) [Clark] and *Protection de la jeunesse* -- 477, [1991] R.J.Q. 861 (C.Q.).

<sup>243</sup> *Wisconsin v Yoder* 406 U.S. 205 (1972).

<sup>244</sup> *Ibid* at 212. These influences included self-distinction, worldly success and competitiveness and social life with other students.

<sup>245</sup> *Ibid* at 215.

<sup>246</sup> *Ibid* at 234.

sex.<sup>247</sup> This is not to say that parental rights are absolute, the American constitutional guarantees with regard to parental religious rights are somewhat different to South African protections which need to survive the limitations clause.

In the case of *Christian Education South Africa v Minister of Education*, the applicant argued that the Schools Act<sup>248</sup>, which prohibited corporal punishment in schools, violated the rights of parents of children at independent schools who, in line with their religious convictions, consented to its use.<sup>249</sup> While the Constitutional Court recognised the sincerity of the religious beliefs of the applicants, it held that freedom of religion like any other right in the Constitution was not absolute and could be limited in terms of section 36 of the Constitution. In the Court's view the limitation that had been imposed on the applicants by the Schools Act was justifiable in that it attempted to promote respect for the dignity and physical and emotional integrity of all children.<sup>250</sup> According to the court, the parents were not being forced to make an absolute and strenuous choice between obeying the law of the land and following their consciences.<sup>251</sup> The judgement left open the question whether physical punishment in the home was justifiable.

There is no doubt that balancing parental religious beliefs about education and other aspects of child rearing with recognition of the rights of the child and state interests remains a daunting task for courts. This is especially the case when there is a conflict between the beliefs of the parents and the legitimate aims of the state. A fine balance needs to be drawn between respecting the rights of parents, who frequently have the best interests of their children at heart and intervention obligations of the state when parents undermine the best interest of

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<sup>247</sup> P Henigan 'Is parental authority absolute? Public Schools which provide gay and lesbian youth services do not violate the constitutional childrearing right of parents' (1996) 62 *Brook. L. Rev.* 1261 at 1270.

<sup>248</sup> Act 84 of 1996.

<sup>249</sup> *Christian Education SA v Minister of Education* supra note 108.

<sup>250</sup> Ibid at paragraphs [50] and [51] at 786B/C - C and 787B/C - D.

<sup>251</sup> Ibid at [51] at 787D - F.

the child. Outside of the educational issues the issue of parental beliefs with regard to medical treatment is becoming an increasingly common issue before the courts.

#### **4.6 Conclusion**

Religious and philosophical convictions of parents underpin various decisions that they make with regard to their children. At the same time belonging to a religious or cultural community can also provide the child with a sense of belonging and can provide the child the cultural resources to reinforce the child's developing identity.<sup>252</sup> Like culture, religious beliefs define societal understandings of the parent-child relationship and in turn at the larger level the relationship between the family and the state. This chapter has shown that South African while South African law recognises and protects the religious rights of parents with regard to their children, these rights are by no means absolute. By focusing on the controversial issue of religious rights with respect to education this paper has argued that unlike American jurisprudence, South African courts are more willing to fetter parental rights where exercise of these rights undermines legitimate state interests in protecting children or where the exercise is seen to undermine the best interests of the child.

However, this chapter has also attempted to show the difficulties that arise with such willingness by the courts to intervene. Using the example of the *Kotze* case we argued that the courts should enforced the divorce clause as it did not undermine the best interests of the child. This approach was advocated for because given the centrality of religion in the lives of many South Africans and its implications for individual and group identity, the approach followed by the Court in *Kotze* may be misconstrued as being anti-religion. However, in all the other cases it was evident that the law recognises that parents have legally protected interests in providing their children with the moral guidance and direction with

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<sup>252</sup> L Bilsky 'Child-Parent-State: The absence of community in the courts' approach to education' in Douglas and Sebba (eds) *Children's rights and traditional values* op cit note 5 at 149.

regard to their identity formation and decision making matters. However, like any right these parental rights are limited by state interests in protecting the best interests of the child.

This paper has shown that the attempt to balance the competing interests can be a daunting task within the constitutional framework with the battle between the state, the parents and the child him/herself. Religious beliefs of parents, while in most instances protecting the best interests of the child may be the source of isolating the child from external sources of help when parental actions are contrary to the best interest of the child. This is especially the case when one is dealing with parents or families that have deeply held convictions. In the area of formal education, this balancing process raises questions about who should have the final say. If we accept that parents or families are best equipped to decide on the religious instruction of their children we run the risk elevating religious rights above the best interests of the child. However, equally undesirable, if we take drastically fetter with parental power, we run the risk of undermining one of the fundamental human rights which hold up the fabric of the family unit, the very unit that society relies upon to care for the young.

What if needed is an approach that adequately recognises religious and cultural diversity without undermining the rights of the child and such an approach is fully articulated in the South African Constitution and the CRC which requires the best interests of the child to be the primary consideration in all matters. The best interests' principle provides a relatively objective solution to reconciling religious rights with the rights of the child. As we have already noted in the introductory section of this chapter if South African society is to be open and democratic in the fullest sense it must be tolerant and accepting of the different religious beliefs that exist in our society. However, this recognition cannot be justified if it sacrifices the rights of children in order to acknowledge diversity. South African courts have done well in comparison to its American counterparts in their willingness to actively engage with the competing interests to better serve the

best interests of the child. What is clear is that the issue of religion and children's right will forever remain a deeply contentious issue in all societies.



## CHAPTER V

### CONCLUSION

The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.  
UNESCO Universal Declaration on Cultural Diversity (2001)

The CRC establishes a universal standard for children's rights. The existence of this universal standard however, does not suggest that children's rights can be or should be abstracted from their social or cultural contexts.<sup>253</sup> Religious and cultural difference in the world forces courts to confront some of the difficult questions about *universality in* children's rights. This paper has attempted to explore the influence of religious and cultural values in our understanding of universal norms and rights.

By looking at some of the most progressive judgments on children's rights in the South African jurisprudence, this thesis has shown that while culture and religion are often seen as undermining the normative value and practical utility of children's rights, cultural and religious difference is an escapable aspect of children's rights discourse.<sup>254</sup> Exploring various aspects of cultural and religious values this paper has shown that agreement on the universal relevance and applicability of children's rights norms does not in itself translate into consensus on the more concrete questions about these rights. If anything, the universalisation and the resultant constitutionalisation of children's rights in South Africa requires that the issue of cultural difference be confronted in a pragmatic manner. This is so because while the focus may be on state responsibilities at the international level, at the implementation/grassroots level, where it matters most, the 'private' realm of family life remains the last preserve of firmly entrenched cultural values and traditions.<sup>255</sup> Cultural and religious values are

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<sup>253</sup> A Lopatka op cit note 31.

<sup>254</sup> S Harris-Short op cit note 21 at 133.

<sup>255</sup> Ibid at 135.

often deeply set and soon become part of the individual or communal identity. When these values interact with other competing value systems the result is often either a facilitation or frustration of one by the other. This thesis has shown that South African law has attempted to accommodate culture and religion in children's rights discourse and the approach of the courts has had differing implications on South African family law as a whole.

In the chapter on the family this paper explored the family, its protection as a unit in the South African Constitution and the implications of its protection on the rights of the child. This chapter argued that protection of the family entailed protection of both the family as a unit and protection of its individual members.<sup>256</sup> South African jurisprudence on the right to family life has been propelled to a large extent by children's rights discourse. In the past protection of the family was rooted in the recognition of blood ties and the marital union. Today, the protection of family life embraces a wide range of family structures and family forms that go beyond the traditional nuclear family.<sup>257</sup> Outside of recognition of the right to dignity in defining the concept of family, various children's rights principles have been used by South African courts to afford different forms of parent-child relationships protection under the Constitutional provisions. However, while South African family law has progressed, it is evident that the nuclear family continues to enjoy more protection than the extended family that exists in various South African cultural communities. This paper argued that if the right to parental and family care are to be taken seriously, there is a need for the law to recognise the increasing role that grandparents and other family members play in the care of young children. Such recognition has important implications not only for these other family members but for children themselves who have a right to be cared for by their families, however family may be defined.

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<sup>256</sup> Merin op cit note 55 at 83.

<sup>257</sup> *Dawood and Another v Minister of Home Affairs* supra note 56.

The protection of the right to culture in the South African Constitution has often been seen as militating against women and children's rights. In South Africa, the application of customary law in family law issues such as the law of succession has yielded a considerable amount of debate about the compatibility of this system of law with children's rights. Using the cases of *Mthembu* and *Bhe*, this thesis argued that the tendency to put customary law and constitutional principle of equality on a collision course may undermine the best interests of the child.<sup>258</sup> This paper argued that South African courts have failed to reconcile the right to culture with the rights of the child. It argued that similar to the issue of family, the law had a strong bias towards the common law and this oversight by the courts has the tendency to undermine the difference conceptions of children and their rights which exists between the common law and customary law. It suggested that a more accommodative approach to the principles and values of the positive aspects of customary law may serve the best interests of the child. As such, it advocated the idea that it is possible to reconcile customary law values with the rights of the child. It argued that the positive aspects of African culture should be protected. Courts should be able to apply the underlying principles and values that are being protected by customary practices that seem to be contrary to constitutional values. Furthermore, customary law must not be treated as a static system of law that is out of touch with the current lives of the people. While the paper does not suggest that customary law should be protected at all costs, it highlights that the best interest principle as a principle that exists in both the common law and in customary law, has different conceptions in both systems of law and it is important for courts to remain aware of this least their judgments become ineffectual.

When it comes to parental religious rights and the rights of the child, it was shown that parental religious beliefs have important implications for various aspects of children's rights and the exercise of their own rights under international human rights law. One of the most difficult questions in South

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<sup>258</sup> A Sachs op cit note 96 at 13.

African children's rights jurisprudence is how to balance the constitutional and common law rights of parents and the rights of children without undermining one at the expense of another. On the one hand, religious and cultural beliefs form an integral part of the individual and communal identity and as such are afforded considerable recognition and protection in international human rights law and in the South African Constitution. On the other hand, they may conflict with fundamental rights and state interests in advancing human rights or protecting the best interests of the child when such values conflict with others. By looking at the influence of parental religious rights in the area of education, this thesis showed that such rights can either frustrate or facilitate the best interests of the child. The balancing of children's interests, parent's interests and state interests in the lives of children remains a constant battle that South African and other courts have to confront.

Religious and cultural values held by individuals and communities represent are more than mere lifestyle choices; they are a source of individual and communal worldviews that are as valid as other sources. The interaction of these values systems with international humanitarian and domestic constitutional law in the realm of children's rights raises fundamental questions about the extent to which universal standards on abstract principles and norms can translate into uniformity. The answer in this thesis is that the universality of children's rights cannot be and must not be misconstrued to be a quest for blind uniformity. In as much as states are diverse at the international level, at the local level families and communities are diverse. While they are all bound by the same South African Constitution, their conception of childhood, parenthood and its entitlements define their understanding of the best interests of the child. However, in recognition of cultural diversity it is essential that cultural and religious difference not be used to undermine fundamental rights of children. This paper has argued that what is positive in these values must be preserved however, that which is contrary to the best interests of the child must be rejected.

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